92-1558

No.

In The

Supreme Court of the United States

October Term, 1992

GEORGE GUY DERDEN, III,

Petitioner,

vs.

SHERIFF SAMMIE McNEEL and MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard employed by the Fifth Circuit Court of Appeals to determine when cumulative error justifies habeas corpus relief, as to which the Courts of Appeals are in conflict, is unduly restrictive?

2. Whether the aggregate of errors had the cumulative effect of rendering Petitioner's trial so fundamentally unfair that he was denied his due process rights?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 978 F.2d 1453 (5th Cir. 1992). It is attached as Appendix "A."

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on December 16, 1992 pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Fourteen, which says:

> [N]or shall any state deprive any person of life, liberty or property without due process of law.

FEDERAL STATUTE INVOLVED

The federal statute involved is 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a Circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This cause came before the Fifth Circuit Court of Appeals on the petition of George Guy Derden, III for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was tried and convicted of burglary in the Circuit Court of Clay County, Mississippi, and was sentenced to serve a term of seven years. The burglary at issue occurred on February 10, 1983. Derden was indicted in October,

1985 and the trial commenced on April 14, 1986. The State's evidence consisted entirely of the testimony of three persons who admitted taking part in the burglary, Willie Sherrod, Jay Posey, and Tommy Turner, each of whom received "very good and sweet deals from the prosecution" in return for their testimony. *Derden v. McNeel*, 978 F.2d 1453, 1463 (5th Cir. 1992) (Garza, J., dissenting). The jury found Derden guilty of the burglary and the judge sentenced Derden to seven years. Sherrod and Posey were not indicted for burglary and Turner received a five-year suspended sentence with five years' probation.

Derden filed the present action pursuant to 28 U.S.C. § 2254 alleging as error: (1) that he was denied a fair trial in a fair tribunal; (2) that a directed verdict should have been entered or, alternatively, that the verdict was against the overwhelming weight of the evidence; (3) that the sentence imposed was excessive; (4) that the State withheld evidence; and (5) that he was denied effective assistance of counsel.

On February 16, 1990, United States Magistrate Jerry A. Davis recommended that the petition for writ of habeas corpus be granted. Magistrate Davis concluded that the aggregate of trial errors had the cumulative effect of rendering Derden's trial fundamentally unfair. On March 19, 1990, United States District Court Judge Glen H. Davidson adopted the Magistrate's Report and Recommendation in part and overruled the recommendation in part. The district court judge overruled that part of the magistrate's report and recommendation which recommended that habeas relief be granted because the district court disagreed that the cumulative effect of the trial errors rendered the trial fundamentally unfair. Derden appealed from Judge Davidson's Order.

On August 16, 1991, the Fifth Circuit panel reversed the judgment of the district court and granted Derden's writ of habeas corpus. The State of Mississippi was ordered to retry Petitioner

within ninety days or "set him free". *Derden v. McNeel*, 938 F.2d 605, 607 (5th Cir. 1991). In so ordering, the Fifth Circuit panel recognized a cumulative error defense in a habeas corpus case for the first time. The court determined that there was no set formula for performing a cumulative error analysis in a habeas case, but that each case must be independently examined. "The sole dilemma for the reviewing court is whether the trial taken as a whole is fundamentally unfair." *Id.* at 609.

The Fifth Circuit panel determined that cumulative error analysis was appropriate in a habeas corpus context because

> [t]his is a Fourteenth Amendment Due Process inquiry and the fact whether one or several trial errors caused the trial to be fundamentally unfair is not important. It has been the law for some time that one error in a trial can violate a petitioner's Fourteenth Amendment right to due process.
>
> * * *
>
> Several errors taken together can also violate a petitioner's right to due process and cause the trial to be fundamentally unfair. . . . Hence, we are not inventing new law. We are only applying that which was secured to the accused over two hundred years ago.

Derden v. McNeel, 938 F.2d at 610 (citations omitted). The panel further found "a glaring violation of due process. . . . warrant[ing] habeas relief" based on (1) the conduct of the judge and the prosecutor, (2) the fact that the witnesses who testified in order to obtain the conviction had each made deals with the state, and (3) the impeachment evidence the defense was denied. *Id.* at 618.

On August 29, 1991, the State moved for rehearing *en banc*. On September 13, 1991, the Fifth Circuit entered an Order treating the suggestion for rehearing *en banc* as a petition for panel rehearing and ordering that the petition for panel rehearing was *denied*. On October 31, 1991, however, the Fifth Circuit entered an Order directing that the case be reheard *en banc* without oral argument.

On January 21, 1992, the case was reheard *en banc* without oral argument. On December 16, 1992, the Fifth Circuit affirmed the judgment of the district court denying habeas corpus relief. *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992). The Court held

> that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes;[1] and (3) the errors 'so infected the entire trial that the resulting conviction violates due process'.

Id. at 1454 (citations omitted). The Court further held that this particular case failed to satisfy those enumerated standards. *Id.*

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1. As the *en banc* court pointed out, "[n]either the state courts nor Mississippi's brief has relied on procedural bar . . ." *Derden v. McNeel*, 978 F.2d 1453, 1459 n. 8 (5th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH BETTER REASONED DECISIONS FROM OTHER CIRCUITS.

The issue of cumulative error in a habeas corpus context has not been addressed by the United States Supreme Court. The Courts of Appeals which have addressed this issue have rendered conflicting opinions. The Sixth and Seventh Circuits have embraced a cumulative error defense on habeas corpus review. *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.), *cert. denied*, 464 U.S. 951, 104 S. Ct. 367, 78 L. Ed. 2d 327 (1983) ("Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.") and *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088, 109 S. Ct. 1552, 103 L. Ed. 2d 855 (1989) ("Errors in the management of a state criminal trial do not deny the defendant due process of law, . . . unless they are so harmful to the cause of truth that, singly or cumulatively, they make the defendant's conviction fundamentally unfair, . . ."). *See also Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950, 110 S. Ct. 2212, 109 L. Ed. 2d 538 (1990) ("The ultimate question we must answer is whether the asserted trial errors, measured according to the fundamental principles of a fair criminal process implicit in the due process clause of the fourteenth amendment, were so egregious as to have nullified the legitimacy of the properly admitted substantive evidence of the defendant's guilt.").

The Eighth Circuit, however, has rejected the cumulative error theory, finding that "each habeas claim must stand or fall on its own". *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990), *cert.*

denied, ___ U.S. ___, 111 S. Ct. 1626, 113 L. Ed. 2d 723 (1991). With this opinion, the Fifth Circuit describes itself as joining the majority rule "subject to" enumerated standards. *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992). Thus, the Fifth Circuit forges a new middle ground for cumulative error analysis on habeas corpus review. This Court should grant this Petition for a Writ of Certiorari because the Fifth, Sixth, Seventh, and Eighth Circuits are in conflict on this important legal principle.

II.

THE OPINION BELOW UNDULY RESTRICTS THE CONCEPT OF CUMULATIVE ERROR.

The *en banc* court headlined its discussion of the cumulative error theory with the rationale for its "particularly cautious approach to granting habeas relief for cumulative errors." *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992).

> 'Cumulative error' is an infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process. Under its aegis, an error that would not have risen to constitutional dimension by itself might suddenly, when aggregated with other non-constitutional errors, become worthy of habeas relief. The legal certainty afforded by rules drawn from the specific Bill of Rights provisions related to criminal law could then yield to the subjectivity of fundamental fairness determinations. Worse yet, a free-floating fundamental fairness rule subverts the

> uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record.

Id. at 1457-58. The court concluded its opinion by defining cumulative error in the context of habeas corpus review as "a narrow and rare form of a due process violation." *Id.* at 1461.

The Fifth Circuit's stated rationale paints with too broad a brush. First, although perhaps it is conceivable that the cumulative error theory could "run amok," it has yet to do so. As the concurring opinion noted:

> The majority's effort to fetter the constitutional doctrine of cumulative error contains the implicit suggestion that the doctrine is an open-ended threat to comity, finality, and federalism, values we all share. I do not agree. The doctrine is, in my view, quite narrow — as evidenced by the majority's inability to locate more than two instances from our thousands of habeas cases in which a state petitioner has succeeded with the argument.

Id. at 1462 (Higginbotham, J., concurring).

Second, the *en banc* court raises concerns about the "subjectivity of fundamental fairness determinations" and "a free-floating fundamental fairness rule." *Id.* at 1457-58. The concept of "fundamental fairness", however, is *by definition* subjective and free-floating.

> Tomes have been written about the meaning of due process under the fourteenth amendment. But we have searched in vain for any useful, authoritative statement by the Supreme Court, or by the countless other writers who have addressed the subject, defining the elements, the criteria, the immutable components of a fair trial within the meaning of the due process clause of the fourteenth amendment. The accumulated precedent and scholarship on the subject instructs us that procedural due process is, in the last analysis, simply the court's notion of "fundamental fairness," *Rochin v. California,* 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L. Ed. 183 (1952), and compliance with the principles "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 151, 82 L. Ed. 288 (1938).

Lundy v. Campbell, 888 F.2d 467, 470 (6th Cir. 1989).[2] The application of cumulative error to habeas review does not make the fundamental fairness inquiry any *more* free-floating or subjective.

Finally, although the *en banc* court premises its holding on "the uniformity of results that is the basic goal of an organized legal system" and "due regard for the finality of state court judgments",[3] this Court has previously established the priority of

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2. See also *Derden v. McNeel,* 978 F.2d at 1463 n.1 (Garza, J., dissenting) ("I begged my fellow judges on the Fifth Circuit to read the record, or at least the opinions of the magistrate and the district judge in this case *because a decision of fairness is left up to the individual judge.*") (Emphasis added).

3. *Derden v. McNeel,* 978 F.2d at 1458.

the Great Writ. "The federal writ of habeas corpus overrides all these considerations [federalism, comity and finality], essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." *McCleskey v. Zant*, 499 U.S. ___, 111 S. Ct. ___, 113 L. Ed. 2d 517, 544 (1991).

The effect of the Fifth Circuit's *en banc* opinion is to obliterate the cumulative error theory in a habeas case. By conditioning relief on the standards imposed, the Fifth Circuit has gone to unnecessary lengths to decimate the cumulative error theory. As the concurring opinion noted, "With all respect to my colleagues in the majority, they take a club to a pup and by doing so tell the world that it is a wolf — a perverse result that is doubtlessly unintended." *Id.* at 1462 (Higginbotham, J., concurring).

The wholesale limitation on the defense was unnecessary because a cumulative error analysis in the habeas context is not a departure from present law, but is simply a corollary of that law. The concept is implicit in the United States Supreme Court's definition of due process of law "as a historic and generative principle" which "precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' " *Rochin v. California*, 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183, 190 (1952). It goes without saying that error that does not constitute a constitutional violation on its own may combine with other nonconstitutional error to deprive a criminal defendant of fundamental rights.[4] There is no distinction between a

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4. *See United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984) (In the context of a direct appeal, the Fifth Circuit has recognized "that the cumulative effect of several incidents of improper argument or misconduct may require reversal, even though no single one of the incidents, considered alone, would warrant such a result.")

situation in which multiple error renders a trial fundamentally unfair and a situation in which a single error renders a trial fundamentally unfair. To hold otherwise exalts form over substance.[5]

To limit habeas relief for cumulative error to situations in which the individual errors "involved matters of constitutional dimension rather than mere violations of state law" is to eliminate the theory entirely. Under the cumulative error theory, the determinative factor is whether there was enough *non-constitutional* error to render the trial fundamentally unfair. Obviously, where there is a constitutional violation or an "error of constitutional dimension", the cumulative error theory does not even come into play.

> . . . if taken at face value, the clear implication of the majority opinion is that whenever the bulk of the errors occurring during the course of a trial are errors of state law, there can be no denial of due process. The majority seems to believe, that absent the existence of individual errors of 'constitutional proportion,' the cumulative effect of *all* errors could never 'impugn fundamental fairness.' This approach simply begs the question.
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> It is true that mere errors in the application of state law are generally not cognizable in the federal habeas corpus context . . . Yet, errors of state law which result in a denial of fundamental fairness *do justify* habeas corpus relief . . . .

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5. "The United States Constitution sets a floor which the state may not go below. Consequently, the inquiry is whether this line was crossed." *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991).

> The threshold question, therefore, is not whether errors are errors of state or federal law, but whether there has been an inroad on fundamental fairness. To answer that question is the precise aim of any cumulative error analysis.

Payne v. Janasz, 711 F.2d 1305, 1316-17 (6th Cir. 1983) (Jones, J. dissenting).

To further limit such relief to situations in which the errors "so infected the entire trial that the resulting conviction violates due process" is to allow the *whole* of the standard for such relief to be relegated to the position of one of three *conditions* for such relief. *See Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166 (1941) ("In order to declare a denial of [due process] we must find that the absence of that fairness fatally infected the trial . . .")

CONCLUSION

The *en banc* court finds the fact "[t]hat the constitutionality of a state criminal trial can be compromised by a series of events none of which individually violated defendant's constitutional rights" to be "a difficult theoretical proposition." *Derden v. McNeel*, 978 F.2d at 1456.[6] Because "several errors taken together" can clearly cause a trial to be fundamentally unfair as easily as one constitutional error, the cumulative error theory is not a radical concept. However you get there, the result is still the same: a

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6. The concurring opinion by Judge Higginbotham acknowledged "the majority's antipathy for the basic constitutional doctrine of cumulative error," *id.* at 1461, and noted that two members of the court could not agree with the majority's "assertion that the doctrine is mutable — one thing on direct appeal, but another on habeas review." *Id.*

person "is in custody in violation of the Constitution . . ." 28 U.S.C. § 2254(a). This Court should grant Petitioner's petition for a Writ of Certiorari, and address this important issue because, as the dissenting opinion in *Derden v. McNeel*, 978 F.2d 1453, 1462 (5th Cir. 1992), noted:

> . . . no matter how much the majority has written in trying to limit the law of habeas corpus on cumulative error, our Constitution still guarantees every criminal defendant, no matter his background or criminal record, a fair trial. If Derden's trial violated his due process then his constitutional right to a fair trial was violated and he is entitled to a new trial.

Respectfully submitted,

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APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 16, 1992

George Guy DERDEN, III,

Plaintiff-Appellant,

v.

Sheriff Sammie McNEEL and Attorney General — State of Mississippi,

Defendants-Appellees.

United States Court of Appeals,
Fifth Circuit.

Dec. 16, 1992.

Appeal from the United States District Court for the Northern District of Mississippi.

Before POLITZ, Chief Judge, REYNALDO G. GARZA, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, EMILIO M. GARZA, and DeMOSS, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

On initially hearing this case, the majority of a panel of our court concluded that an accumulation of actions prejudicial to petitioner George Guy Derden deprived him of a fundamentally fair trial for burglary in Mississippi state court. *Derden v. McNeel*,

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* Judge Barksdale recused himself and did not participate in this decision.

938 F.2d 605 (5th Cir. 1991). After *en banc* rehearing, we now hold that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400-01, 38 L.Ed.2d 368 (1973). This case fails to satisfy those standards.

I. BACKGROUND

A rational jury could have convicted Derden of participating in the burglary of Wade's Grocery in Pheba, Mississippi shortly after midnight on February 10, 1983.[1] The burglars unsuccessfully attempted to remove a safe, then fled in mid-crime at the sight of an approaching vehicle. Three of the burglars, each of whom had reached a very favorable deal with the prosecution, testified to Derden's involvement. The co-conspirators were Willie Sherrod, who worked at Derden's carpet store in Columbus, Mississippi and had a string of armed robberies in his past, and Jay Posey and Tommy Turner, young men who first met Derden the night of the burglary and barely recognized him later. They all testified that Derden drove them in his van with his girlfriend Pam Smith to Wade's Grocery and was participating in the crime until it aborted. Derden, Turner and Smith escaped in the van, leaving Posey and Sherrod to hitchhike through the darkness and rain. At a nearby farmhouse, Posey and Sherrod found a ride back to Turner's West

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1. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). Derden's attempt to contest the constitutional sufficiency of the evidence against him was perfunctory at best.

Point, Mississippi apartment. According to Turner, the group in Derden's van experienced car trouble and drove along back roads, finally dropping Turner off in West Point before Posey and Sherrod arrived. Derden was stopped in his van and ticketed at 3:45 a.m. for having broken tail lights.

In his defense, Derden tendered an alibi and challenged the credibility of the other burglars. His alibi was supported principally by his own testimony and that of Pam Smith. According to this tale, Derden had lent his van to Sherrod that night while he and Smith went to Houston, Mississippi in Sherrod's car and measured two houses for carpet until midnight. Neither Smith nor Derden, however, had been able to identify the houses or their occupants. The alibi was subjected to devastating cross-examination. For instance, Derden produced receipts and business records of minutiae such as three-year old gasoline purchases, yet he had mysteriously lost the receipt for the carpet he sold in Houston that night. Further, Derden's counsel agreed with the prosecutor to introduce in evidence Derden's statement to the sheriff, made during investigation of the crime. As luck would have it, some hearsay information on that statement directly contradicted Derden's testimony that he switched vehicles with Sherrod at the Apollo Club the night of the burglary.

Derden sought to undermine the confessed burglars' testimony by emphasizing the favorable treatment they received from the prosecutors. He also tried to show that their chronologies of events were hopelessly inconsistent, hence untrustworthy. The farmer's son who agreed to give Sherrod and Posey a ride when they showed up on his father's doorstep after midnight testified that he dropped them off in West Point by about 2:00 a.m. All three burglars testified that Turner had returned to his West Point

apartment before Sherrod and Posey. But according to the sheriff who investigated the crime, the route of Turner's odyssey in Derden's van, which included a stop to work on the tail light, could not have landed Turner at home until well after 3:00 a.m.

The jury found Derden's defense unpersuasive. He was sentenced to seven years in Mississippi state prison. On appeal to the Mississippi Supreme Court, Derden raised numerous points of error similar to those he later argued in federal court: prosecutorial misconduct during *voir dire*, judicial bias, withholding of exculpatory evidence, and lack of fundamental fairness.[2] With one exception, the Mississippi Supreme Court found Derden's arguments so meritless that they warranted no discussion. *See Derden v. State*, 522 So.2d 752, 755 (Miss. 1988). The state supreme court did rule that the prosecutor violated Mississippi law in the conduct of *voir dire* on the co-conspirators' testimony, but it

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2. The numerous appellate points raised by Derden in the Mississippi Supreme Court relative to the fundamental fairness of the trial were: (A) evidence of fundamental unfairness was adduced at the pretrial hearing; (B) the prosecution's obtaining promises by the jurors to believe the State's co-conspirator witnesses contributed to the denial of a fair trial; (C) the trial judge's frustrating defense counsel's attempt to make an opening statement contributed to an unfair trial; (D) the trial judge's commenting that neither he nor the jury "cared" about one of the accused's defenses contributed to the denial of a fair trial; (E) The trial judge's continuous correction of the accused, and admonitions to him in front of the jury, contributed to the denial of a fair trial; (F) the trial judge's admission of the hearsay statement by Richard Dismuke that Derden had not been at the Appollo Club on the night of the burglary in question contributed to the denial of a fair trial; (G) the two-and-one-half-year delay in the trial contributed to the denial of a fair trial; (H) permitting the co-indictee, Pam Smith, to be cross-examined about her failure to come forward with a statement concerning the burglary contributed to the denial of a fair trial; and (I) permitting the jury to hear evidence of other crimes contributed to the denial of a fair trial.

held that this error was later cured by the trial court's jury instruction.[3]

Unsuccessful on direct appeal, Derden sought habeas corpus relief. He persuaded the magistrate that "the trial judge's demeanor coupled with the prosecutor's over-zealous actions" impugned Derden's credibility in a case that hinged on credibility choices and produced a pervasively prejudicial trial atmosphere. The district court rejected the magistrate's conclusion and held that the cumulative effect of the events at trial did not fatally undermine its fundamental fairness or the accuracy of the verdict. The panel majority in this court read the record and held that the challenged events at trial were so unfair to Derden that while not individually meriting the grant of the Great Writ, they cumulatively violated his constitutional right to due process. We reverse course again, and, disagreeing with the panel majority's application of the cumulative error theory, we affirm the district court's denial of relief.

II. DISCUSSION

That the constitutionality of a state criminal trial can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a difficult

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3. In Mississippi, jurors are instructed to view the testimony of co-conspirators with great caution and suspicion. Contrary to this rule, the prosecutor sought to obtain assurances that the jurors would treat the co-conspirators' testimony like any other. The trial court, while not precisely condoning these questions, allowed several of them to be posed. He later instructed the jury that, "I charge you that Jay Posey, Willie James Sherrod and Tommy Turner have admitted being accomplices to this burglary. You are to regard this testimony with great suspicion and to consider it with caution." The Mississippi Supreme Court held the *voir dire* error was cured by this instruction. *Derden*, 522 So.2d at 754.

theoretical proposition and is one to which the Supreme Court has not directly spoken.[4] With one exception, however, our sister circuits have held in *dicta* that federal habeas relief may issue if a defendant was denied fourteenth amendment due process by the cumulative effect of errors committed in a state trial, which together deny fundamental fairness.[5] We join the majority "rule" subject to the following discussion.

Several of the circuit court decisions drew an analogy with cases on direct criminal appeal in which the possibility of cumulative error is often acknowledged but practically never found persuasive.[6] Such rote analogy is misleading. The standard for reversal on direct appeal of a criminal conviction, whatever it may be, should logically be more flexible than that available on

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4. While one court has cited *Rochin v. California*, 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952), in support of a cumulative error theory, *Walker v. Engle*, 703 F.2d 959, 969 (6th Cir. 1983), that is rather like citing the Declaration of Independence: general statements about inalienable rights or "fundamental fairness" tell us little about the prerogatives of an individual in concrete factual situations.

5. *See, e.g., Lundy v. Campbell*, 888 F.2d 467, 481 (6th Cir. 1989), *cert. denied*, 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088, 109 S. Ct. 1552, 103 L.Ed.2d 855 (1989); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984), *cert. denied*, 470 U.S. 1050, 105 S.Ct. 1747, 84 L.Ed.2d 812 (1985); *Walker v. Davis*, 840 F.2d 834, 838 (11th Cir. 1988) (arguably a prosecutorial misconduct case rather than cumulative error); *but see Girtman v. Lockhart*, 942 F.2d 468, 475 (8th Cir. 1991), (citing *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990) (citations omitted), *cert. denied*, __ U.S.__, 111 S.Ct. 1626, 113 L.Ed.2d 723 (1991) ("each habeas claim must stand or fall on its own.").

6. *See, e.g., United States v. Middlebrooks*, 618 F.2d 273, 277 (5th Cir. 1980), *cert. denied*, 449 U.S. 984, 101 S.Ct. 401, 66 L.Ed.2d 246 (1980); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977). It must be remembered that

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collateral review. We are not here considering the basis for cumulative error review on direct appeal of federal convictions. However, because the habeas cases have also rejected cumulative error theories on the facts presented, their definitions of it are perfunctory. As an example, the Sixth Circuit describes cumulative errors as those that do not individually deny due process "but, when considered together, leave 'no doubt that the jury was too tainted and influenced to be able to give the petitioner a fair trial.' " *Lundy*, 888 F.2d at 481. Our research has revealed only two cases in which federal habeas relief was granted because of an accumulation of trial court errors. In these cases we may glimpse the rationale for the cumulative error theory. This court essentially relied on such a theory when it granted the writ to a defendant whose trial was overshadowed by an ambiguous stipulation that prevented him from arguing an insanity defense while the prosecutor repeatedly asserted, contrary to overwhelming medical evidence, that the defendant could not have been insane when he murdered his wife and slashed his own wrists. *Guidroz v. Lynaugh*, 852 F.2d 832, 837 (5th Cir. 1988). The results of these errors likely led to the rendition of an inaccurate verdict. In *Walker v. Engle*, 703 F.2d 959 (6th Cir. 1983), *cert. denied*, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983), the court found that six types of evidence introduced by the prosecution were calculated "to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness." 703 F.2d at 968. The trial was "inflamed by

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(Cont'd)

errors that might justify reversal of a case under the federal supervisory power need not be so egregious as those that would justify granting collateral relief against a state court judment. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974). *But compare United States v. Diharce Estrada*, 526 F.2d 637 (5th Cir. 1976) (conviction reversed on direct appeal because court's rush to try case quickly deprived defendant of a fair trial).

marginally relevant and irrelevant evidence that was highly prejudicial." *Id.* The prejudicial evidence allowed the trial "to focus more on the claimed corruption of the Sheriff's Department than on the issue of Walker's guilt or innocence . . . " of first degree murder.[7] *Id.* These cases fit the Supreme Court's description of a denial of due process as "the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that *the absence of that fairness fatally infected the trial*; the acts complained of must be of such quality as *necessarily prevent a fair trial.*" *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941) (emphasis added).

Few defendants, however, will succeed in demonstrating on collateral review that their prosecutions merited such condemnation. As the Supreme Court has recently reminded us, "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990). Heeding this admonition, we adopt a particularly cautious approach to granting habeas relief for cumulative errors. "Cumulative error" is an infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process. Under its aegis, an error that would not have risen to constitutional dimension by itself might

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7. In *Walker*, 840 F.2d at 838, the Eleventh Circuit held that the writ could be granted where the prosecuting attorney had also testified as a witness against the defendant. The case was remanded, however, for an examination of procedural default.

suddenly, when aggregated with other non-constitutional errors, become worthy of habeas relief. The legal certainty afforded by rules drawn from the specific Bill of Rights provisions related to criminal law could then yield to the subjectivity of fundamental fairness determinations. Worse yet, a free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record.

Equally important, granting habeas relief from state convictions for aggregated non-constitutional errors may too easily conflict with established limits on the scope of federal habeas relief. That result would thwart recent decisions that emphasize due regard for the finality of state court judgments. *See, e.g., Coleman v. Thompson*, __ U.S. __, __, 111 S.Ct. 2546, 2563, 115 L.Ed.2d 640 (1991); *McCleskey v. Zant*, __ U.S. __, __ __, 111 S.Ct. 1454, 1468-69, 113 L.Ed.2d 517 (1991); *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334 (1989). To avert such a conflict, while recognizing that formulating a complete definition of unconstitutional cumulative error is not feasible, we can at least eliminate certain types of complaints that should generally not be considered in cumulative error review. By this process of elimination, minimum standards at least normally applicable to a cumulative error claim of constitutional dimension may be expressed.

First, any cumulative error theory must refer only to *errors committed* in the state trial court. A habeas petitioner may not just complain of unfavorable rulings or events in the effort to cumulate errors. *See United States v. Rivera*, 900 F.2d 1462, 1470-71 (10th Cir.1990) (*en banc*); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th

Cir.1987) ("Twenty times zero equals zero."). If an action of the trial court cured a putative error, the petitioner is complaining only of an adverse event rather than actual error. *Compare Donnelly,* 416 U.S. at 645, 94 S.Ct. at 1872.

Second, the error complained of must not have been procedurally barred from habeas corpus review. *See, e.g., Coleman v. Thompson, supra.* Beyond the notion of procedural bar, it is important that a defendant objected to errors to demonstrate that they were believed at the time of trial to have had an adverse effect on the defense. A trial transcript is lifeless, bereft of the nuances of behavior, facial expression and inflection of voice that so powerfully influence the participants and jury. A transcript may be misleading: it may suggest for instance, that the trial judge made a comment arguably demeaning to the defendant, although the judge actually intended to display wry humor or to mutter to himself rather than reprove the defendant. Only a contemporaneous objection, difficult as it may be to criticize comments by the judge or opposing counsel's argument, distinguishes harmless remarks from those truly felt to be prejudicial to the defense.

Third, errors of state law, including evidentiary errors, are not cognizable in habeas corpus as such. *Estelle v. McGuire,* __ U.S. __, __, 112 S.Ct. 475, 480, 116 L.Ed.2d. 385 (1991); *Marshall v. Lonberger,* 459 U.S. 422, 438 n. 6, 103 S.Ct. 843, 853 n. 6, 74 L.Ed.2d 646 (1983). Errors of state law rise to constitutional dimension only if they "so infused the trial with unfairness as to deny due process of law." *Lisenba v. California,* 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941); *see also Walker v. Engle, supra.*

Fourth, the federal court must review the record as a whole to determine whether the errors more likely than not caused a suspect verdict. *Kirkpatrick v. Blackburn,* 777 F.2d 272, 281 (5th Cir.

1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986).

This case vividly demonstrates the shortcomings of free-range cumulative error analysis. The errors regarded as heavily prejudicial by the panel majority either did not involve "errors" so much as adverse events, or were not preserved by objection in the trial court, or concerned state law rather than constitutional questions. Significantly, they were not outcome-determinative. Derden's claims transgress nearly all of the limits that must circumscribe cumulative error review for federal habeas corpus purposes.

Derden alleged three sources of "error" that allegedly poisoned the atmosphere of his trial: comments by the trial court; two instances of prosecutorial misconduct; and a *Brady* violation. The record does not, however, confirm the baleful influence that Derden attributes to these events.

A. *The Judge*

The conduct of a trial judge can violate due process only if the judge so favors the prosecution that he appears to predispose the jury toward a finding of guilt or to take over the prosecutorial role. *See United States v. Middlebrooks,* 618 F.2d 273, 277 (5th Cir.), *cert. denied,* 449 U.S. 984, 101 S.Ct. 401, 66 L.Ed.2d 246 (1980); *United States v. Sheldon,* 544 F.2d 213, 219 (5th Cir.1976). Some of the comments by Derden's trial judge were ambiguous or imprudent, but taken in the context of the entire, hotly contested trial, they did not deny due process. Derden did not make a single objection to the trial court's allegedly inflammatory remarks.[8]

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8. Neither the state courts nor Mississippi's brief has relied on procedural bar, but as was earlier pointed out, while the making of a contemporaneous objection

(Cont'd)

Appendix A

Taking the allegedly offensive judicial remarks one by one, Derden complains that the court admonished him not to look at the jury.[9] At this point in his testimony, Derden had begun a speech, wholly unresponsive to the prosecutor's question, directly trying to appeal to the jury. Repeatedly, Derden's responses to questioning by the prosecutor and his own attorney had been unresponsive and narrative. The court repeatedly cautioned Derden several times about this conduct. The judge had instructed Derden twice on the preceding page of the transcript, and at other times, to answer questions directly. The court's exasperation is understandable, whether or not his particular instruction was appropriate.

Derden also objects to the court's having sustained four objections to his attorney's opening argument. The prosecutor's

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(Cont'd)
suggests, the perceived harmfulness of a particular judicial remark, its absence suggests the contrary.

9. Q: That's a receipt that you had, is that right, Mr. Derden? You testified from a gas ticket that you had, a receipt that you had put nine—so many gallons of gas in your—in your van on—on the ninth of February, is that right? A: I certainly did, yes, sir.

Q: Now, of course, there's nothing on that thing to tell us when that was made out, is there, Mr. Derden? A: Well I've been in jail, ladies and gentlemen, since January twenty, eighty—eighty-five—

THE COURT: Just a minute. Face the lawyer and answer the lawyer's questions, and you do not address the jury, you understand? I'm not going to caution you about this again.

opening argument had been extremely brief. Defense counsel could have summarized his contentions with similar brevity by saying that the co-conspirators were all lying, because their stories were completely inconsistent and each had received a deal from the prosecutor in order to "get" Derden. Instead, defense counsel embarked on a rambling preview of the likely evidence. Surely the judge was entitled to set some limits on opening remarks, both to maintain control of his courtroom and because attorneys' statements are not evidence.

In this court, Derden recounts instances in which the trial judge admonished defense counsel in various ways during trial. Derden's trial counsel neither objected to any of the sporadic comments in the trial court nor pointed them out specifically on appeal to the Mississippi Supreme Court. Under such circumstances, it is impossible to calculate the effect of such remarks on the jury.

Derden complains that the trial court responded to the prosecutor's objection to the defendant's closing argument by saying he did not hear defense counsel's argument.[10] Such candor might have been regrettable, but in the end, the court did not sustain the objection and defense counsel proceeded. The record provides no context for this remark, and appellate counsel, not having served at trial, offer no elucidation.

Contrary to Derden's overriding charges of trial court bias, the record reveals other instances in which the court aided defense counsel. The court insisted that the prosecutor obtain, for purposes of impeachment, records of Sherrod's prior criminal activities that

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10. The court said: "I just wasn't paying any attention; I don't know what was said, Counsel, but you may proceed."

were not readily available to defense counsel. The court also allowed hearsay questioning by defense counsel during a preliminary hearing and at trial. On balance, the court ruled evenhandedly on both sides' objections.

Federal courts are poorly situated to evaluate the "tone" of state court proceedings from the abstract vantage point of a trial transcript. Federal judicial officers are increasingly unlikely in this day and age to be personally acquainted with their state counterparts or with the lawyers who appeared at trial. We cannot impute vitriol or impropriety to comments that a record renders ambiguous. Reflecting this caution, we are persuaded that none of the judge's comments is even an obvious abuse of discretion, much less that they acted cumulatively or in tandem with other events to poison the jury against Derden.

B. *The Prosecutor*

The standard for granting habeas relief because of prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). As we have noted, "federal courts may not, in a habeas corpus proceeding, impose the same standards upon state prosecutors that they apply to federal prosecutors in cases on direct appeal." *Kirkpatrick*, 777 F.2d at 281. Derden pointed out two violations of Mississippi law by the prosecutor, both of which were corrected by the trial court. The prosecutor admittedly overstepped his bounds under Mississippi law when in *voir dire* he tried to commit the jury to evaluate the co-conspirators' testimony like any other. This state law error, the State Supreme Court held, would have been reversible if the trial court had not properly instructed the jury at the end of trial to beware of such testimony. *Derden*, 522 So.2d at 754-55. The prosecutor also erred under Mississippi law

in eliciting from Sherrod that Derden was his accomplice in other robberies. But this misstep was immediately corrected by the trial court's instruction to the jury to disregard that evidence. Derden did not move for a mistrial. If Derden had been tried in federal court, a violation of Federal Rule of Evidence 404(b) might have occurred—neither a constitutional error nor reversible in itself, particularly because of the trial court's prompt curative instruction. *See e.g., Woodruff v. Lane,* 818 F.2d 1369, 1373 (7th Cir.1987); *Sargent v. Armontrout,* 841 F.2d 220, 224 (8th Cir. 1988). Under *Estelle, supra,* these violations of state law were not of a constitutional dimension, and it defies logic to suggest that the prosecutor who committed them behaved in an unconstitutionally prejudicial way.

C. *The Brady Violation*

The prosecutor's alleged *Brady*[11] violation likewise furnishes no assistance to Derden. He contended that the prosecution withheld evidence of the police radio log that showed that no radio call was made on the Wade's Grocery Store burglary until 2:00 a.m. Derden argues that the radio log conflicted with and would have impeached the cp-conspirators' testimony that the burglary occurred between 12:00 and 1:00 a.m. It is not clear, however, that such evidence would have been exculpatory. The police might have acted on their report slowly. Other witnesses timed the burglary between 12:00 and 1:00 a.m. If the co-conspirators' and witnesses' sense of the time was incorrect, that does not cast doubt that a burglary occurred, nor does it demonstrate in any greater degree that the other burglars fabricated Derden's involvement. We disagree that the evidence on police call sheets was material or exculpatory, as a *Brady* claim requires.

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11. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Appendix A

D. *The "Cumulative" Impact*

Because there were no trial court errors that affected Derden's specific constitutional rights, a few that were properly preserved by objection, the "error" predicate for a cumulative error habeas corpus theory dissolves. Even if the events of which Derden complains were "errors," it cannot reasonably be said that they cumulatively so infected the trial with unfairness as to render his conviction a denial of due process. Co-conspirator testimony should indeed be suspect and viewed with caution, as the trial court instructed the jury, but here, the jury was fully aware of the favorable treatment the other burglars had received from the prosecutors. Further, Turner and Posey testified that they gave the prosecutor statements implicating Derden in the burglary *before* any plea bargain was reached. The inconsistencies in the co-conspirators' testimony related only to the timing of events the night of the burglary. Derden's alibi was demonstrably weak and unsupported by any disinterested testimony. He was stopped while driving his van in the wee hours of February 10 and ticketed for having broken tail lights. In the swearing match between Derden and his defense witnesses and the co-conspirators, the jury could readily have believed the co-conspirators. Had *none* of the events of which Derden now complains occurred, it is almost certain that he would have been convicted of burglary.

Derden's habeas case, rather than crying out for the federal courts to curb a state judicial system run amok, evokes that endless multiplication of claims disparaged by this court in *Mullen*, 808 F.2d at 1147. Derden's assembly of cumulative errors has varied kaleidoscopically as he proceeded through state and federal review of his conviction. In the state court, he complained of a fundamentally unfair pretrial hearing, of the erroneous admission of hearsay testimony, and the violation of Pam Smith's fifth

amendment rights as among the errors contributing to a due process violation. In the federal courts, however, he abandoned those points but beefed up the number of instances of alleged judicial bias. Several of his complaints of judicial misconduct have never been proffered to the Mississippi courts, by objection or otherwise. His mutating claims represent the logical conclusion of a process of seeking "fundamental fairness" unconstrained by standards or limits.

In concluding that Derden's right to due process was not violated by the Mississippi state court, we need not disagree that some errors were committed. Whether considered individually or cumulatively, however, the trial errors did not assume constitutional significance, and we are led to the conclusion that if Derden's trial was in some ways procedurally imperfect, it was by no means fundamentally unfair. *Lundy,* 888 F.2d at 481. *Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). Cumulative error in habeas corpus review, a narrow and rare form of a due process violation, in no way applies to the facts before this court.

The judgment of the district court denying habeas corpus relief is AFFIRMED.

WIENER, Circuit Judge, concurring in the result of the majority opinion.

HIGGINBOTHAM, Circuit Judge, with whom KING, Circuit Judge, joins, specially concurring:

I concur in the judgment that this habeas petitioner has failed to show that he was denied his right to procedural due process under the Fourteenth Amendment, the ultimate assurance of a fair

trial. I do not agree with the majority's antipathy for the basic *constitutional* doctrine of cumulative error nor its assertion that the doctrine is mutable—one thing on direct appeal, but another on habeas review.

There are few cases in which the constitutional doctrine of cumulative error might upset a conviction. There are few procedural errors that are sufficiently serious in combination to render a trial fundamentally unfair that do not independently step on some constitutionally assured right—for the obvious reason that we have found constitutional assurances for so many of the trial processes of a criminal case. As the Supreme Court put it, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has little operation."[1]

We have no warrant to read this *constitutional* doctrine one way in habeas and another on direct review. The constitutional doctrine, sans any element of supervisory process, is the same in habeas and on direct review. This is, of course, a process-protecting doctrine, and its use after the full processes of state review will likely have less play than at an earlier stage. It is quite a different matter to treat cumulative error as of a piece with the Supreme Court's trimming of habeas—in *McCleskey, Teague,* and *Coleman.*[2] This new-found incompatibility of the constitutional doctrine of cumulative error and habeas is also at odds with the history of federal habeas review of state convictions. The most

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1. *Dowling v. U.S.*, 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990).

2. *Coleman v. Thompson*, __ U.S. __, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *McCleskey v. Zant*, __ U.S. __, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

ardent proponents of habeas reform urge that decisions of constitutional issues by state courts ought not be reviewed by a federal habeas court at all *if* the state has accorded a convict a full and fair review; that is, *if* procedural minimums are met. *See e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441 (1963). This argument for reform accepts the habeas court's inquiry into procedural fairness and, *a fortiori*, its inquiry into fundamental fairness. The majority opinion attacks even this restricted role for lower federal courts and I cannot join it.

The majority's effort to fetter the constitutional doctrine of cumulative error contains the implicit suggestion that the doctrine is an open-ended threat to comity, finality, and federalism, values we all share. I do not agree. The doctrine is, in my view, quite narrow—as evidenced by the majority's inability to locate more than two instances from our thousands of habeas cases in which a state petitioner has succeeded with the argument. With all respect to my colleagues in the majority, they take a club to a pup and by doing so tell the world that it is a wolf—a perverse result that is doubtlessly unintended.

REYNALDO G. GARZA, Circuit Judge, with whom POLITZ, Chief Judge, joins, dissenting:

I respectfully dissent from the majority opinion. The majority opinion, as written, was not necessary because this case does not involve legal issues and no matter how much the majority has written in trying to limit the law of habeas corpus on cumulative error, our Constitution still guarantees every criminal defendant, no matter his background or criminal record, a fair trial. If Derden's trial violated his due process then his constitutional right to a fair trial was violated and he is entitled to a new trial.

Appendix A

As I said before, no legal principles were involved here, only questions of fact. This is a case which is case specific and fact intensive in its nature. I do not think that there is any question that the cumulative errors that Derden complains of and that I set out in the panel opinion of *Derden v. McNeel*, 938 F.2d, 605, and the other errors that came to light after the en banc briefs were requested and that are mentioned in other parts of this record, occurred. The United States Magistrate that heard the evidence in this case found the alleged errors to have taken place and recommended that the writ be granted. The United States District Judge who passed on the recommendation of the Magistrate Judge also found that the errors had occurred but was under the mistaken belief that under "Fifth Circuit law" he could not grant the writ. So, we are not alone in outlining the cumulative errors that Derden complains of but also that the effect of those errors deprived him of a fair trial. Aside from what I have said in the majority opinion of the panel, we must keep in mind that the alleged burglary in this case is alleged to have occurred on February 10, 1983, that the indictment was not brought until approximately two years and nine months later in October of 1985, that Derden was arrested January 3, 1986, and arraigned on January 28, 1986. We point this out because a person forgets a lot of things that happened over a span of nearly three years.

The evidence against Derden came from three admitted accomplices who got very good and sweet deals from the prosecution to get them to testify against Derden. Everyone else that testified upheld Derden's alibi defense or impeached the testimony of the accomplices. Derden's defense was that he was not present at the burglary. That while the burglars were using his van, he had loaned his van to Sherrod, who worked for him, and he had taken Sherrod's car. To prove this Derden was denied to do so at every turn.

Appendix A

For starters, the incident in footnote 9 of the majority opinion when Derden was asked the question about a receipt and he started to answer—

> "Well I've been in jail, ladies and gentlemen, since January twenty, eighty—eight-five"—

and the court immediately, without any objection from anybody said,

> "Just a minute. Face the lawyer and answer the lawyer's questions, and you do not address the jury, you understand? I'm not going to caution you about this again."

To me the judge not letting Derden face the jury was grievous error. After all, they were the ones that were going to decide his guilt or innocence. All of us, I know, have heard jurors say, "I did not believe that defendant because he did not look us in the eye."

I have been on the federal bench for thirty-one years. Eighteen-plus of those on the district bench trying hundreds and hundreds of criminal cases and since coming on board the Fifth Circuit I have heard appeals on many, many criminal cases. I think I have a feel in deciding when a person has gotten a fair trial. I have no apologies to make to anyone for deciding as the magistrate did and as the district judge did, if he had not been mistaken about our "Fifth Circuit law", that Derden did not get a fair trial. As far as I know only four of us have read the record.[1] This case has turned

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1. I begged my fellow judges on the Fifth Circuit to read the record, or at least the opinions of the magistrate and the district judge in this case because a decision of fairness is left up to the individual judge.

into a beauty contest between me and Judge Jones and it is a contest I do not think I can win if the judges vote on what a judge says and not because they have read the record. The writer is not alone in deciding that the cumulative errors complained of deprived Derden of a fair trial, there are others in the judicial process that think likewise. The writ should be granted and Derden given a new trial as was held by the original panel.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 8, 1993

No. 90-1230

D.C. Docket No. EC 88 187 D D

GEORGE GUY DERDEN, III,

Plaintiff-Appellant,

versus

SHERIFF SAMMIE McNEEL and ATTORNEY GENERAL, STATE OF MISSISSIPPI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

Before POLITZ, Chief Judge, REYNALDO G. GARZA, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS JONES, SMITH, DUHE, WIENER, EMILIO M. GARZA and DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court denying habeas corpus relief in this cause is affirmed.

Appendix B

December 16, 1992

ISSUED AS MANDATE: JAN 7 1993

Wiener, Circuit Judge, concurs in the result.
Higginbotham, Circuit Judge, with whom KING, Circuit Judge joins, concurs specially.
R. Garza, Circuit Judge, with whom Politz, Chief Judge, joins, dissents.

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By s/ Mary Frances [illegible]
Deputy
New Orleans, Louisiana

92-1558
No.

Supreme Court, U.S.
FILED
MAR 16 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GEORGE GUY DERDEN, III,

Petitioner,

vs.

SHERIFF SAMMIE McNEEL and MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX FOR PETITIONER

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APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION DATED MARCH 19, 1989

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. EC 88-187-D-D

GEORGE GUY DERDEN, III

Petitioner

v.

SHERIFF SAMMIE MCNEEL AND MISSISSIPPI DEPARTMENT OF CORRECTIONS

Respondents

MEMORANDUM OPINION

This matter comes before the court on petitioner and respondents' objections to a report and recommendation filed by United States Magistrate Jerry A. Davis dated February 7, 1990, which recommended petitioner's writ of habeas corpus be granted. After reviewing the record, the report and recommendation, and the objections to the report and recommendation,[1] the court is of the opinion that the report and recommendation should be adopted in part and overruled in part.

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1. Although respondents' objections were not timely filed, the court will consider them in making its decision.

Appendix C

In April 1986, petitioner was convicted of burglary in the Clay County Circuit Court and sentenced to serve a term of seven years in the custody of the Mississippi Department of Corrections. He is presently incarcerated in the Lowndes County Jail in Columbus, Mississippi. Petitioner filed the present action pursuant to 28 U.S.C. § 2254 alleging as error: (1) that he was denied a fair trial in a fair tribunal; (2) that a directed verdict should have been entered or alternatively, that the verdict was against the overwhelming weight of the evidence; (3) that the sentence imposed was excessive; (4) that the state withheld evidence; and (5) that he was denied effective assistance of counsel.

The magistrate concluded that petitioner is not entitled to relief on claims 2 through 5. The court agrees and adopts sections II through IV of the magistrate's report as the opinion of the court. Petitioner's first claim, that he was denied a fair trial in a fair tribunal, is based upon nine separate alleged errors at trial. Although the magistrate concluded that none of the nine alleged errors standing alone entitle petitioner to relief, the cumulative effect of the trial errors had the effect of rendering his trial fundamentally unfair.[2] The court agrees that none of the nine alleged errors standing alone entitles petitioner to relief. The court, however, disagrees that the cumulative effect of the trial errors rendered the trial fundamentally unfair or that such cumulative effect entitles petitioner to relief.

Although the Fifth Circuit has indicated a willingness to

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2. Respondents argued that the court is precluded from recognizing the cumulative error claim because petitioner did not raise that claim in his petition. The petition alleged that each error "contributed" to the denial of a fair trial. Construing the petition liberally, the court concludes that petitioner raised the cumulative error claim in the petition. *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988).

consider the cumulative prejudice resulting from trial errors in direct appeals from criminal convictions, *see United States v. Cochran,* 697 F.2d 600, 608 (5th Cir. 1983), it has also indicated that cumulative error is not a proper basis upon which to grant habeas corpus relief. *Mullen v. Blackburn,* 808 F.2d 1143, 1147 (5th Cir. 1987).

In *Mullen,* the court considered several claims of petitioner: (1) that identification evidence was improperly admitted; (2) that a photograph was improperly admitted; (3) that hearsay testimony was improperly admitted; (4) that the trial judge improperly referred to petitioner as a "subject"; (5) that he was improperly denied a transcript of the voir dire proceedings; (6) that he had ineffective assistance of counsel; and (7) that the presentence report contained inaccurate information. The court analyzed each claim and determined that no claim warranted habeas corpus relief. Petitioner also claimed that the claims collectively entitled him to relief. The court refused to consider petitioner's claim.

> Mullen finally asserts that even if none of his claims entitles him to relief individually, all of them collectively, do. Habeas relief is available only where a prisoner is in custody in violation of the Constitution or of federal law. 28 U.S.C. § 2254. Mullen cites no authority in support of his assertion, which, if adopted, would encourage habeas petitioners to multiply claims endlessly in the hope that, by advancing a sufficient number of claims, they could obtain relief even if none of these had any merit. We receive enough meritless habeas claims as it is; we decline to adopt a rule that would have the effect of soliciting more and

> has nothing else to recommend it. Twenty times zero equals zero.

Mullen, 808 F.2d at 1147. *Byrd v. Armontrout*, 686 F. Supp. 743, 784 (E.D. Mo. 1988), *aff'd*, 880 F.2d 1 (1989). *See also Lee v. Lockhart*, 754 F.2d 277, 279 (8th Cir. 1985) (each claim of constitutional error in a habeas corpus petition must stand on its own).

The court finds *Mullen* controlling precedent in the case *sub judice*. Standing alone, none of petitioner's claims warrant habeas relief. None of the alleged violations rise to the level of constitutional error. Since none of the claims rendered the trial fundamentally unfair to the extent that petitioner was denied due process of law under the fourteenth amendment, *see LaRoche v. Wainwright*, 599 F.2d 722, 726 (5th Cir. 1979), the court is of the opinion that petitioner is not entitled to habeas corpus relief.[3]

Even if the cumulative error argument were recognized by the Fifth Circuit and the prejudices suffered by petitioner due to errors that, by themselves, do not reach constitutional magnitude could be aggregated, the court disagrees with the magistrate that the case

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3. Although *Mullen* indicates that cumulative errors cannot be aggregated to find constitutional error, the court notes that the cumulative error argument might be persuasive in a case where constitutional errors exist and the analysis becomes one of harmless error. *See Kirkpatrick v. Blackburn*, 777 F.2d 272, 280 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178, 106 S. Ct. 2907 (1986). Accumulating the prejudice resulting from constitutional errors might convince a court that harmless error plus harmless error does not necessarily equal harmless error. *See Lundy v. Campbell*, 888 F.2d 467, 472 n.3 (6th Cir. 1989). But harmless error analysis is conducted only after a finding of constitutional error. *Kirkpatrick*, 777 F.2d at 280.

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sub judice is one where the aggregate of the errors produced a trial that was so fundamentally unfair that petitioner was denied due process of law. The Sixth Circuit, which recognizes the cumulative prejudice approach, *Walker v. Engle,* 703 F.2d 959, 962-63 (6th Cir. 1983), *cert. denied,* 474 U.S. 962, 104 S. Ct. 396 (1983), stated the due process test as follows: "whether the asserted trial errors, measured according to the fundamental principles of a fair criminal process implicit in the due process clause of the fourteenth amendment, were so egregious as to have nullified the legitimacy of the properly admitted substantive evidence of the defendant's guilt." *Lundy,* 888 F.2d at 473.

The magistrate concluded that "the trial judge's demeanor coupled with the prosecutor's over-zealous actions combined to produce a prejudicial atmosphere that prevailed throughout petitioner's trial." Report and Recommendation p. 31. The following actions of the trial judge were cited as prejudicial.

> DEFENSE COUNSEL:
> I have one other brief—very brief witness, your honor.
>
> THE COURT:
> All right, if it's not brief, I'm going to make it brief.
> (Tr. 537).

During defense counsel's closing argument, the prosecution objected to a certain part of defense counsel's argument. The court responded to the objection by stating:

> THE COURT:
> I just wasn't paying attention; I don't know

what was said counsel, but you may proceed. (Tr. 582).

Included in the magistrate's analysis as an error of prejudicial force is the judge's admonitions to petitioner while petitioner was testifying in his own defense. The admonitions were as follows:

DEFENSE COUNSEL:

Assuming Turner was telling the truth, and that van was — Had gone from West Point over to Pheba after you'd filled up in Columbus and made a slight detour toward Starkville, and then gone up to Houston in your opinion would that van have needed any gas in it in Houston?

PETITIONER:

That van could have gone to Memphis, Tennessee, without needing any gas.

THE COURT:

It will not be received into evidence. Let me caution the witness. Mr. Derden, I don't care if it had gone to Memphis or Chicago and the jury don't either; just answer his question, do you understand?

PETITIONER:

Yes, sir.

THE COURT:

All right, you may proceed.
(Tr. 466-67).

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* * *

PETITIONER:
Sir, can I make a statement?

THE COURT:
No. Your lawyer can adequately represent you.
(Tr. 468-69).

* * *

DEFENSE COUNSEL:
Mr. Derden, how long did it take you to measure that house up yonder in Houston?

PETITIONER:
I measured two houses. I would — I would say I was at the first house approximately maybe an hour, and then I was at the second house like I said I talked to the people because the man was interested in selling some carpet in the Houston area he indicated.

THE COURT:
Just a minute. Witness, he asked you a simple question, how long did it take you to measure the houses. He didn't ask you who you talked to or what the conversation was. Just answer the question, how long did it take you to measure the two houses?
(Tr. 482-83).

* * *

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PROSECUTION:

And the amount of a van load full, is that correct?

PETITIONER:

(witness looks through records) There was nineteen rolls; one of them was two hundred and forty-eight feet and nine inches long. Oh, I'm sorry, that's the accumulated total.

THE COURT:

Mr. Derden, can't you just answer whether or not it was a van load full or half full or a quarter full.

PETITIONER:

It was — it was a van load full, sir. I had nineteen rolls.

THE COURT:

All right, that's what he asked you.
(Tr. 492).

* * *

PROSECUTION:

That's a receipt that you had, is that right, Mr. Derden? You testified from a gas ticket that you had, a receipt that you had put nine — so many gallons of gas in your — in your van on — on the ninth of February, is that right?

PETITIONER:

I certainly did, yes, sir.

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PROSECUTION:

Now, of course, there's nothing on that thing to tell us when that was made out, is there, Mr. Derden?

PETITIONER:

Well, I've been in jail, Ladies and Gentlemen, since January twenty, eighty — eight-five —

THE COURT:

Just a minute, face the lawyer and answer the lawyer's questions, and you do not address the jury, you understand? I'm not going to caution you about this again.
(Tr. 499).

* * *

PETITIONER:

Could I not answer that question he asked me, sir if I know the answer to it?

THE COURT:

When you answer a question answer yes or no, you understand? If it needs an explanation I'll let you explain your reason, but first answer yes or no.
(Tr. 507).

The magistrate concluded that the trial judge's statements, exclusive of other alleged errors, were not qualitatively or quantitatively substantial enough to lead the jury to a predisposition of guilt by improperly confusing the functions of

judge and prosecutor. Report and Recommendation p. 17. *See also United States v. Davis*, 752 F.2d 963, 974 (5th Cir. 1985). After reviewing the proceedings as a whole, the court agrees that the trial judge's actions did not render the trial fundamentally unfair. There were statements by the judge that should have been avoided or, at least, worded differently to prevent the appearance of bias. But all in all, the court cannot conclude that the statements led the jury to conclude that the judge was prejudiced against petitioner.[4]

The magistrate's conclusion is also based upon errors committed by the prosecution. The prosecution committed error during the voir dire proceedings in asking the jurors if they would weigh the co-conspirators' testimony as they would weigh any other testimony. The prejudice from that incorrect statement of the law was greatly minimized by the court's curative instruction to the jury at the close of trial that co-conspirator's testimony should be viewed with great caution and suspicion. The prosecution's statement certainly falls short of constitutional error. *See Kirkpatrick*, 777 F.2d 272. The prosecution also extracted information from a witness regarding prior crimes allegedly committed by petitioner. The court sustained defense counsel's objection to the testimony and instructed the jury to disregard the testimony. The court finds no constitutional error here since the court properly sustained the objection and issued the curative instruction. The trial was not rendered fundamentally unfair because the jury heard evidence of other crimes, especially when it was instructed to disregard that testimony. *See Blankenship v.*

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4. The court notes that at the conclusion of the evidence the trial court instructed the jury that it was his responsibility to make rulings on the admissibility of evidence and that the jury "should not infer, however, from any of the court's rulings that the court has any opinion on the merits of the case favoring one side or the other." (Tr. 562-63).

Estelle, 545 F.2d 510, 516 (5th Cir. 1977), *cert. denied*, 444 U.S. 856 (1979). The court concludes that any prejudice suffered by petitioner regarding the evidence of other crimes and the voir dire questioning is minimal in light of the curative instructions given by the court.

Even if such claims could be aggregated to obtain a cumulative sum of prejudices, the sum would not be enough to render the trial fundamentally unfair. If a due process claim is asserted that does not claim a violation of one of the provisions of the Bill of Rights incorporated into the fourteenth amendment by the due process clause, due process is violated only if the defendant's trial was fundamentally unfair. *See Kirkpatrick*, 777 F.2d at 278, 280. The test for determining whether a trial is fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Kirkpatrick*, 777 F.2d at 278-79. *See also Guidroz*, 852 F.2d at 835. After reviewing the trial transcript in its entirety, the court does not find that a reasonable probability exists that the verdict might have been different had the foregoing errors not been committed. There was ample evidence from which a jury could infer petitioner's guilt. The prosecutorial comments resulted in minimal prejudice as did the testimony regarding petitioner's previous criminal activities. Furthermore, the comments of the judge did not have a substantial impact on petitioner's credibility or the perceived validity of his defense. The trial was not perfect, but neither was it fundamentally unfair.

Therefore, that part of the magistrate's report and recommendation which recommends that habeas relief be granted on the basis that petitioner was denied due process of law because the cumulative sum of trial errors rendered the trial fundamentally unfair should be overruled. The remainder of the report and

recommendation should be adopted as the opinion of the court.

THIS 19th day of March, 1989.

s/ Glen H. Davidson
United States District Judge

APPENDIX D — REPORT AND RECOMMENDATION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION FILED FEBRUARY 7, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NO. EC88-187-D-D

GEORGE GUY DERDEN, III

Petitioner

V.

SHERIFF SAMMIE MCNEEL AND MISSISSIPPI DEPARTMENT OF CORRECTIONS

Respondents

REPORT AND RECOMMENDATION

This cause comes before the court on the petition of George Guy Derden, III for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In April, 1986, Derden was convicted of burglary in the Clay County Circuit Court and sentenced to serve a term of seven years in the custody of the Mississippi Department of Corrections. He is presently incarcerated in the Lowndes County Jail in Columbus, Mississippi. He has exhausted his available state remedies and now seeks review in this court.

Derden cites as error: (1) That he was denied a fair trial in a fair tribunal; (2) that a directed verdict should have been entered or,

alternatively, the verdict was against the overwhelming weight of the evidence; (3) that the sentence imposed was excessive; and (4) that the state withheld evidence.

I. A Fair Trial in a Fair Tribunal

As the first ground in support of his petition for habeas corpus relief, Derden argues that he was denied a fair trial in a fair tribunal. This argument is based upon nine separate alleged errors at trial.

Derden states that the specter of fundamental unfairness began at the pretrial hearing. He argues that no less than five witnesses testified at the pretrial hearing that the same police officers who investigated this burglary had been guilty of serious misconduct toward Derden in a previous arson investigation. Derden claims that these two officers suborned perjury in connection with the burglary investigation.

The state trial court conducted a hearing prior to trial on Derden's motion to dismiss for denial of due process (Tr. 82-188). Several witnesses, including Derden, gave testimony concerning the allegations made against the two officers. The trial court found that there was no proof of any conspiracy to "get" Derden.

Pursuant to 28 U.S.C. § 2254(d), the factual determinations of a state court, made after a hearing on the merits of the issue, must be premused to be correct unless the federal court explicitly finds that one of eight exceptions applies. *Lavernia v. Lynaugh*, 845 F.2d 493, 499-500 (5th Cir. 1988) *citing Sumner v. Mata*, 449 U.S. 539, 544-46, (1981); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). When a trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness's testimony as being truthful, or implicitly

discredits another's, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly. *Lavernia*, 845 F.2d at 500 *citing Marshall*, 459 U.S. at 433-34.

The undersigned concludes that the trial court's finding that there was no conspiracy to "get" Derden must be presumed to be correct under § 2254(d). Although Derden's co-conspirators were not present to testify,[1] other witnesses did testify and the hearing was full and fair. Furthermore, Derden has failed to establish any of the eight exceptions listed in § 2254(d). Consequently, the trial court's findings are presumed to be correct.

Derden next claims that he was denied the *opportunity to adduce evidence*. He states that though he made a timely request for subpoenas for the two co-conspirators, neither one was present at the pretrial hearing.[2] Derden also claims that it was fundamentally unfair for the trial court to deny his request for permission to run an advertisement in a local newspaper offering a reward for any person who could supply the identity of the person

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1. The co-conspirators had been subpoenaed by Derden's counsel. (Tr. 85) However, the subpoenas were not served upon the co-conspirators personally but upon their attorneys at the direction of Derden's counsel. (Tr. 160) The court ruled that such service was not proper process on the witnesses. (Tr. 85, 161) Derden's counsel wanted to further show possible improper activity by the two police officers by questioning the co-conspirators about any plea bargain they had entered into in exchange for their testimony against Derden. (Tr. 159-60) The trial court found that such testimony would be cumulative. (Tr. 160) The state agreed to furnish Derden's counsel with the agreements. (Tr. 161)

2. As noted *supra*, Derden's counsel advised the clerk that if the two co-conspirators could not be found, the subpoenas should be served on their attorneys. (Tr. 160) The court ruled that this was improper service. (Tr. 161)

for whom Derden was allegedly measuring carpet at the time of the burglary. He claims that this refusal "contrasted remarkably with the fact that the state was offering a huge reward to the witnesses who testified against Derden."

The role of a federal court is more limited than that of the state appellate court. *Skillern v. Estelle,* 720 F.2d 839, 852 (5th Cir. 1983). The federal courts hold no supervisory power over state judicial proceedings, and federal habeas corpus relief is appropriate only when a conviction has been obtained in violation of some constitutionally protected right. *Smith v. Phillips,* 455 U.S. 209, 221 (1981). A federal habeas corpus court's inquiry is restricted to those aspects of the trial affecting a petitioner's federal constitutional rights. *Donnelly v. De Christofero,* 416 U.S. 637 (1974). The undersigned concludes that the instant two claims do not evince a constitutional violation.

Petitioner next contends that he was denied a fair trial when, during the voir dire examination, the prosecutor attempted to obtain promises by the jurors to believe the testimony of the co-conspirators who would be state witnesses. Derden claims that these three co-conspirators had been promised freedom in exchange for their testimony.

During the voir dire examination, the following exchange occurred:

> MR. ALLGOOD:
>
> Very well, The court has — has told you somewhat of the nature of this case. Now it is — it is a burglary of a business. Now the state expects the proof to show that there was a

number of people that went out to burglarize that building on this particular evening. As a matter of fact, five is what the state expects the proof to show. Now three of those people are going to testify for the state, and I think it's going to become apparent that — that there had been what has usually called quote "deals" unquote made with these three other people in order to — to — for them to testify. Now my questions to you in this regard is simply this: First of all, do any of you feel that such testimony, such arrangements, if you will, are inherently untruthful, would inherently cause the witness not to tell the truth?

MR. WAIDE:

Your honor, if the court please, I object to that; that's a question for the jury to determine as to whether it would. I don't think he's — this is the proper time to be arguing about that.

MR. ALLGOOD:

I'm not arguing, your honor, I'm asking a question.

THE COURT:

All right, just ask questions.

MR. ALLGOOD:

Thank you, your honor.

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THE COURT:

Don't argue your case.

MR. ALLGOOD:

Do any of you feel that such testimony from such witnesses is inherently untruthful?
(no response)

MR. ALLGOOD:

If you have any reservations about that, now would be the time to raise your hand.

MR. WAIDE:

Your honor, if the court please, for the record I do object to that. I think it's an improper question, incorrect according to law.

THE COURT:

All right, the record will reflect your objection. You may proceed. I believe they've answered the question, counselor.

MR. ALLGOOD:

Thank you, your honor.

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THE COURT:

Now would anybody — anybody simply disregard the testimony of those witnesses simply because of a plea bargain arrangement with them?

MR. WAIDE:

If the court please, I object to that now; the jury may entirely disregard it if they find from the evidence it should be disregarded, and that's an improper question.

THE COURT:

The court will instruct them on that, counselor, at the proper time.

MR. ALLGOOD:

Would anybody simply disregard their testimony simply because of that plea bargain arrangement?
(no response)

MR. ALLGOOD:

All right, second, on this one point; would any of you automatically disbelieve it just because it was made in this context?
(no response)

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MR. ALLGOOD:

Okay, there is — basically what I'm trying to get to and I — and — and as I understand it, you are all telling me that you will weigh their testimony as you would anybody else's. If anybody says that they cannot do that, that they could not weigh their testimony as they would anybody else's would you please indicate it now be raising your hand?

MR. WAIDE:

Your honor, to which I object because they're not entitled as a matter of law to have their testimony weighed and anybody else's. That's an incorrect statement of the law.

THE COURT:

The court will properly instruct them on the —

MR. ALLGOOD:

Thank you, your honor.

THE COURT:

— Believability or credibility of witnesses at the proper time. Let's move on.

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MR. ALLGOOD:

> Thank you, your honor.
> Is that — if any of you have any problem with that statement that would weigh their testimony as you would anybody else's, would you please raise your hand?
> (no response)

(Tr. 127-131)

Derden argues that the prosecutor was permitted to obtain the jurors' promise to disregard the law in Mississippi that co-conspirators' testimony is to be regarded with caution and suspicion. *See, Winters v. State,* 449 So.2d 766, 771 (Miss. 1984).

The United States Supreme Court has held that a prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted; instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process. *Bell v. Lynaugh,* 828 F.2d 1085, 1095 (5th Cir. 1987), *citing Darden v. Wainwright,* 477 U.S. 168, 181 (1986). Prosecutorial statements may violate due process in two ways. First, prosecutorial statements may implicate a specific provision of the Bill of Rights incorporated into the Fourteenth Amendment by the Due Process Clause. *Rogers v. Lynaugh,* 848 F.2d 606, 608 (5th Cir. 1988). Second, if prosecutorial statements do not implicate any such other incorporated constitutional right, they may constitute a denial of due process generally.[3] *Rogers,* 848 F.2d at 608, *citing Donnelly v.*

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3. This is sometimes called a "generic substantive due process" violation. *See, Rogers,* 848 F.2d at 608; *Kirkpatrick v. Blackburn,* 777 F.2d 272, 280 (5th Cir. 1985).

De Christofero, 416 U.S. 637, 643 (1974). The case law supplies a different test for each kind of due process violation.

In the case of an asserted generic due process violation, the court asks "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Rogers*, 848 F.2d at 5 608, *citing Darden v. Wainwright*, 477 U.S. 168, 181. Under this test, although the asserted prosecutorial misconduct may have made the defendant's trial less than "perfect," that imperfection must have rendered the trial "unfair" in order to be "constitutional error." *Rogers, Id.* at 609, *citing Darden*, 477 U.S. at 183 n. 15. Thus, a court may decide that the asserted imperfection in the trial did not rise to the level of constitutional error without having to apply a harmless error test. *Darden*, 477 U.S. at 183 n. 15.

The Fifth Circuit has developed the following test of constitutional error when a generic due process violation is asserted: "The test applied to determine whether a trial error makes a trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Rogers*, 848 F.2d at 609, *citing Kirkpatrick*, 777 F.2d at 281. The *Rogers* court further stated that there is "such unfairness only if the prosecutor's remarks evince either persistent and pronounced misconduct or . . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Rogers*, 848 F.2d at 609, n. 7, *citing Kirkpatrick*, 777 F.2d at 278-79 (*quoting Fulford v. Maggio*, 692 F.2d 354, 359 (5th Cir. 1982).

In the case of asserted prosecutorial misconduct implicating some other incorporated constitutional right such as the right to remain silent, the court asks "whether or not the [prosecutor's]

statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Rogers*, 848 F.2d at 609, *citing Milton v. Procunier*, 744 F.2d 1091, 1095 (5th Cir. 1984). If under this test the prosecutorial misconduct is constitutional error, the court must generally inquire further whether or not the error is harmless. *Rogers, Id. citing Chapman v. California*, 386 U.S. 18, 21-26 (1967).

The undersigned concludes that petitioner's contention lies within the first of the two areas in which prosecutorial statements may violate due process. Since Derden has not alleged that a specific provision of the Bill of Rights was violated by the quoted comments, he has stated a claim of denial of due process generally.

The Mississippi Supreme Court addressed the instant claim on direct appeal and held:

> First it should be noted that the district attorney was attempting to determine whether or not the prospective jurors would automatically disbelieve the testimony of the co-conspiraters. In doing so he came perilously close to extracting a promise from the jurors and he did misstate the law to the panel.
>
> The district attorney could have asked of the panel "if any one of them would automatically reject the testimony of a co-conspirator as untrue simply because he was a co-conspirator? That would have been sufficient.

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> Error was committed when the prosecutor said to the jury that they could weigh the testimony of the co-conspirators just as they would anybody else's. Defense counsel properly objected at that point on the grounds that that was not a correct statement of law and the court did not sustain the objection. However, when it came time to instruct the jury on the law the trial court quite properly granted the following instruction:
>
> I charge you that Jay Posey, Willie James Sherrod and Tommy Turner have admitted being accomplices to this burglary.
>
> You are to regard this testimony with great suspicion and to consider it with caution.
>
> Had the trial judge not granted this instruction, the colloquy set out above would constitute reversible error and an abuse of discretion by the trial judge and it would be necessary for this court to reverse the conviction. However, because the trial judge properly granted the "caution and suspicion" instruction the jury was properly instructed as to the law and the conviction can be affirmed.

Derden v. State, 522 So.2d 752, 754 (Miss. 1988).

The undersigned must agree. Applying the tests set forth in *Rogers, supra*, the undersigned cannot conclude that a due process violation occurred in the instant cause. In reviewing the voir dire questions for possible prejudice in the context of the trial as a

whole, *Passman v. Blackburn*, 652 F.2d 559, 567 (citations omitted), the questions asked by the prosecution in light of the curative jury instruction, did not infect the trial with unfairness as to make the resulting conviction a denial of due process. Nor, had the questions not been asked, is there a reasonable probability that the verdict might have been different. *See Jones v. Butler*, 864 F.2d 348, 356 (5th Cir. 1988) ("to establish that a prosecutor's remarks are so inflammatory, the petitioner must demonstrate that the misconduct is persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks") (citations omitted); *Byrne v. Butler*, 845 F.2d 501, 508 (5th Cir. 1988). Therefore, the instant argument must also be rejected.

Derden next argues that the trial judge's conduct denied him a fair trial. Initially, petitioner contends that the trial judge frustrated offense counsel's attempt to make an opening statement by sustaining the prosecution's objection to the defense's opening statement. On four separate occasions the prosecution objected that defense counsel was "arguing the case." (Tr. 253-258) The trial judge sustained the objection each time and directed defense counsel to refrain from arguing his case. Derden now claims that this action "may have influenced the jury to believe that the defense was not to be believed."

Derden also contends that he was improperly admonished by the trial court on several occasions. Derden argues that these admonitions, within the hearing of the jury, "could have left no impression other than that he [the trial judge] had a poor opinion of Derden and of his defense." He claims that the following exchanges denied him a fair trial:

> Q Assuming Turner was telling the truth, and that Van was — had gone from West Point over

to Pheba after you'd filled up in Columbus and made a slight detour toward Starkville, and then gone up to Houston in your opinion would that van have needed any gas in it in Houston?

A That van could have gone to Memphis, Tennessee, without needing any gas.

MR. WAIDE:

Tender that last document into evidence, your honor.

THE COURT:

It will not be received into evidence. Let me caution the witness, Mr. Derden, I don't care if it had gone to Memphis or Chicago and the jury don't either; just answer his question, do you understand?

A Yes, sir.

THE COURT:

Q All right, you may proceed.

(Tr. 466-67)

* * *

Q Did you have — what did you do the next day?

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A I installed carpet at — in Columbus — in the Columbus, Mississippi area.

Q Do you have any invoices or business records showing where you were when you installed the carpet the next day?

A Yes, sir, I do.

Q Do — could you produce those for me?

MR. ALLGOOD:

If your honor please, I — I'm going to object to those on the same basis; these were not provided to us in discovery; it's the first time I've ever heard of any such receipts.

MR. WAIDE:

Actually —

MR. ALLGOOD:

I don't think they have any relevancy whatsoever —

THE COURT:

Let him get through, counselor.

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MR. ALLGOOD:

— Any relevancy whatsoever, and I'm going to object to them on that basis.

MR. WAIDE:

Your honor, that's absolutely false, and I'll produce the records where I kept asking them to go over and look at George's records in the jail and he never would go, and I have the letters I've sent to him asking him to go look at them.

MR. ALLGOOD:

If your honor please —

THE COURT:

Counsel, he's testified where he was. Now I don't know what you're trying to do with the records. If you've got witnesses here that made these records and can properly validate them and the people he worked for here to testify that he was there that day, then I'll let them in; otherwise, I am not going to let these records in. He can testify where he was and what he did.

MR. DERDEN:

Sir, can I make a statement?

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THE COURT:

No, your lawyer can adequately represent you.

(Tr. 468-69)

* * *

Q Mr. Derden, how long did it take you to measure that house up yonder in Houston?

A I measured two houses. I would — I would say I was at the first house approximately maybe an hour, and then I was at the second house like I said I talked to the people because the man was interested in selling some carpet in the Houston area he indicated.

THE COURT:

Just a minute. Witness, he asked you a simple question, how long did it take you to measure the houses. He didn't ask you who you talked to or what the conversation was. Just answer the question, how long did it take you to measure the two houses.

A I said I was at the first house approximately an hour; I left the second house sometime the best of my estimate was before midnight on two nine.

(Tr. 482-83)

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* * *

Q I'm sure it is. You unloaded that material there in Columbus, is that correct?

A At the carpet store in Columbus, yes, sir.

Q And the amount of a van load full, is that correct? (witness looks through records) There was nineteen rolls; one of them was two hundred and forty-eight feet and nine inches long. Oh, I'm sorry, that's the accumulated total.

THE COURT:

Mr. Derden, can't you just answer whether or not it was a van load full or half full or a quarter full.

A It was — it was a van load full, sir. I had nineteen rolls.

THE COURT:

All right, that's what he asked you.

Q And you got gas at the Pak and Pok all right that night, Mr. Derden, but you got it and you put it in your van because you were running out of gas from running down to Maben and across and coming up, is that not right, Mr. Derden?

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A I had gassed my van in Columbus, Mississippi; I had put thirty-five to forty gallons of gasoline in it, and I've already stated how — that I got seven miles to the gallon in it, and ladies and gentlemen, y'all know how far it would run on that kind of gas mileage, two hundred and fifty miles —

Q Now you —

A — Sixty miles or seventy miles.

Q That's a receipt that you had, is that right, Mr. Derden? You testified from a gas ticket that you had a receipt that you had, a receipt that you had put nine — so many gallons of gas in your — in your van on — on the ninth of February, is that right?

A I certainly did, yes, sir.

Q Now, of course, there's nothing on that thing to tell us when that was made out, is there, Mr. Derden?

A Well I've been in jail, ladies and gentlemen, since January twenty, eighty — eighty-five —

THE COURT:

Just a minute. Face the lawyer and answer the lawyer's questions, and you do not address

> the jury, you understand? I'm not going to caution you about this again.

(Tr. 499)

The respondents in the instant cause argue that this court should not consider this claim because it was not raised at trial and is thus procedurally barred pursuant to the Mississippi contemporaneous objection rule and *Wainright v. Sykes*, 433 U.S. 72 (1977). However, the record does not contain any opinion or order from the Mississippi Supreme Court that clearly and expressly states that its decision on this claim rests on a procedural bar. Therefore, the undersigned finds that this court may proceed to the merits of the instant claim. *See, Booker v. Lynaugh*, 872 F.2d 100, 101 (5th Cir. 1989).

In *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977), the Fifth Circuit stated:

> A trial judge must exhibit neutrality in his language and in the conduct of a trial before a jury. He should avoid any possibility of prejudicing the jury through his criticism of or hostility toward defense counsel. (citations omitted) Of course a trial judge is not required to remain silent and passive throughout a jury trial. To the contrary, he has a duty to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel. (citations omitted)

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> But in performing this duty he must make every effort to preserve the appearance of strict impartiality. The opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part. (citations omitted) The judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question. (citations omitted)

See also, United States v. Bartlett, 633 F.2d 1184, 1188 (5th Cir. 1981).

In determining whether the trial judge overstepped the limits imposed on judge's conduct, this court must view the proceedings as a whole. *United States v. Carpenter,* 776 F.2d 1291, 1294 (5th Cir. 1985) *citing United States v. Middlebrooks,* 618 F.2d 273, 277 (5th Cir. 1980); *United States v. James,* 528 F.2d 999, 1022 (5th Cir. 1976). To constitute constitutional error, the trial court's actions, viewed as a whole, must amount to intervention which could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor. *United States v. Davis,* 752 F.2d 963, 974 (5th Cir. 1985) (citations omitted). Such judicial intervention must be qualitatively and quantitatively substantial to meet this test. *Davis,* 752 F.2d at 974 *citing United States v. Robinson,* 687 F.2d 359, 361 (11th Cir. 1982).[4]

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4. The undersigned realizes that the cases cited which deal with alleged judicial misconduct are factually distinguishable from the instant case in that the cited cases

(Cont'd)

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While the undersigned agrees that the record reflects tension between the court and Derden, the incidents cited fail to disclose any conduct on the part of the trial judge that gives rise to a constitutional violation. In such a case as Derden's, where the verdict depends almost exclusively on the credibility of the witness, the trial judge's comments to Derden on page 466 and page 499 of the trial record come dangerously close to an improper comment upon the accused's credibility. However, when viewing the record as a whole, the comments are not qualitatively and quantitatively substantial so that the jury could have been led to a predisposition of guilt. Furthermore, Derden's attack upon the discretionary rulings of the trial court with regard to the opening statement, does not amount to a constitutional violation. *See, David v. Maggio,* 706 F.2d 568 (5th Cir. 1983). The claims involving prejudicial misconduct must fail.

Derden next states that the trial court's admission of hearsay evidence contributed to the denial of a fair trial. On cross-examination of Derden, the state asked about a statement allegedly made to Sheriff McNeel by one Richard Dismuke.[5] The defense objected and moved for a mistrial on the ground of hearsay. The trial court sustained the objection and overruled the motion for mistrial. (R. 506) The state then introduced into evidence the written statement made by Derden to Sheriff McNeel which also contained the hearsay statement by Richard Dismuke.[6] (R. 506-08)

(Cont'd)
involve federal district judges. However, the standard for analyzing judicial conduct for constitutional violations remains the same.

5. Mr. Dismuke had been subpoenaed by defense counsel five days before trial. (Tr. 506) However, he was not present to testify at trial.

6. The defense had previously offered the statement as evidence. (Tr. 504)

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After the introduction of the written statement into evidence, the state asked Derden whether he recalled Sheriff McNeel relating to him [Derden] a statement made to the Sheriff by Dismuke. Again, the defense moved for a mistrial, but the court overruled since the hearsay statement was already in evidence. (R. 506-10) Petitioner now claims that the admission of this statement was clearly prejudicial and violated his right to a fair trial.

A federal court in habeas corpus petition reviewing state evidentiary rulings does not sit as a super state supreme court to review error under state law. *Bridge v. Lynaugh,* 838 F.2d 770 (5th Cir. 1988). The United States Court of Appeals for the Fifth Circuit has firmly established resistance to challenges of evidentiary matters by habeas corpus petitions. *See, Bryson v. Alabama,* 634 F.2d 862, 864 (5th Cir. 1981); *Woods v. Estelle,* 547 F.2d 269, 271 (5th Cir. 1977). As a general rule, admissibility of evidence is a matter of state law, and only a contention that the admission of the evidence rendered the trial fundamentally unfair or violated a specific constitutional right will be considered in a federal collateral proceeding. *Johnson v. Blackburn,* 778 F.2d 1044, 1050 (5th Cir. 1985), *citing Meyer v. Estelle,* 621 F.2d 769, 771 (5th Cir. 1980).

This court's inquiry is restricted to those aspects of the trial affecting a petitioner's federal constitutional rights. *Donnelly v. DeChristofero,* 416 U.S. 637 (1974). An evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the Due Process Clause. *Skillern,* 720 F.2d at 852; *Bridge,* 838 F.2d at 772; *Porretto v. Stalder,* 834 F.2d 461, 465 (5th Cir. 1987); *Lowenfield v. Phelps,* 817 F.2d 285, 296 (5th Cir. 1987). This court cannot provide collateral relief simply because the state court's challenged conduct would have led to reversal if the petitioner had been tried in the federal system, *Blankenship v. Estelle,* 545 F.2d

510, 516 (5th Cir. 1977), nor is relief authorized even if state evidentiary rules appear to have been violated. *Blankenship,* 545 F.2d at 516; *see also, Anderson v. Maggio,* 555 F.2d 447, 451 (5th Cir. 1977) ("the mere violation of evidentiary rules by the state trial court does not in itself invoke habeas corpus relief. . .").

As a guideline to applying the criterion of fundamental fairness, the erroneous admission of prejudicial evidence can justify habeas corpus relief only if it is material in the sense of a crucial, critical, highly significant factor in the context of the entire trial. *Anderson v. Maggio,* 555 F.2d 447, 451 (5th Cir. 1977); *Bridge v. Lynaugh, supra* at 772; *Porretto v. Stalder, supra* at 465; *Thomas v. Lynaugh,* 812 F.2d 225, 230 (5th Cir. 1987); *Milton v. Procunier,* 744 F.2d 1091, 1097 (5th Cir. 1984); *Skillern v. Estelle, supra,* at 852.

Derden argues that the admission of the hearsay statement was crucial impeachment evidence since the issue of whether or not Derden swapped cars at Dismuke's night club with one of the co-conspirators lay at the heart of the defense. Derden claims that by allowing the prosecution to discredit his testimony by using hearsay statements denied him a right to a fair trial.

The undersigned agrees that the statement allegedly made by Dismuke to the sheriff was blatant hearsay. The undersigned also agrees that the statement was crucial impeachment evidence which lay at the heart of Derden's defense. Furthermore, the undersigned is troubled that defense counsel did not have an opportunity to cross-examine Dismuke about the statement since he was not present at trial though a subpoena had been issued for him. Such "back door" techniques as used in this instance to admit otherwise inadmissible evidence is not conducive to producing fundamentally fair trials.

However, as noted previously, Derden's counsel had earlier moved the court to receive into evidence Derden's written statement which contained the hearsay. (Tr. 504) The court did not rule on the motion at that time. *Id.* Subsequently, while cross-examining Derden about the hearsay statement, the prosecution joined in the defense's motion to introduce the written statement into evidence. (Tr. 506-507) It was then received into evidence without objection or exception from the defense. (Tr. 507) When the prosecution again questioned Derden about Dismuke's statement, the defense objected to the question on the grounds of hearsay. (Tr. 509) The trial court overruled the objection because the entire written statement had already been received into evidence. (Tr. 509)

In Mississippi, a defendant cannot complain on appeal of alleged errors invited or induced by himself. *Singleton v. State,* 518 So.2d 653, 655 (Miss. 1988) *citing Davis v. State,* 472 So.2d 428 (Miss. 1985); *Browning v. State,* 450 St.2d 789 (Miss. 1984); *Jones v. State,* 381 So.2d 983 (Miss. 1980). When injection of inadmissible evidence is attributable to the actions of the defense, the defense cannot later object to such invited error. *United States v. Raymer,* 876 F.2d 383, 388 (5th Cir. 1989); *United States v. Lemaire,* 712 F.2d 944, 948 (5th Cir. 1983); *United States v. Doran,* 564 F.2d 1176, 1177 (5th Cir. 1977); a *United States v. Taylor,* 508 F.2d 761, 763 (5th Cir. 1975). The undersigned concludes that by moving to introduce the written statement in support of Derden's testimony, Derden's counsel made a tactical decision and invited the erroneous admission of the hearsay. Derden cannot now be heard to attack the trial court's ruling and the claim must fail.

Derden next argues that the delay in bringing him to trial contributed to the denial of a fair trial. He claims that this delay caused him to be unable to locate his alibi witnesses and hindered

the memory of anothe memory of another important witness.[7]

The burglary for which Derden was convicted occurred on February 10, 1983. Though Derden may have been a suspect he was not indicted until October, 1985. (Tr. 3)[8] He was served with the arrest warrant on or about January 23, 1986, (Tr. 152) and arraigned on January 28, 1986. (Tr. 4) The pretrial hearing on motions was held on April 3, 1986, and the trial began on April 14, 1986.

In Mississippi, an accused must usually be brought to trial within 270 days of arraignment. MISS CODE ANN §99-17-1 (Supp. 1989). Since Derden's trial began only sixty-six days after he was arraigned, his claim does not come within the mandate of §99-17-1.

The primary limitation on the government's ability to bring stale criminal charges is found in the statute of limitations. *United States v. Scott,* 795 F.2d 1245, 1249 (5th Cir. 1986) *citing United States v. Marion,* 404 U.S. 307, 322 (1971). The statute of limitations is the principal device that protects a defendant from prejudice arising from a lapse in time between the commission of a

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7. Part of Derden's defense at trial was that he was in Houston, Mississippi on the night of the burglary measuring two houses for carpet he was to install. He could never recall the names of the customers or the location of the houses even though the sheriff took Derden to Houston in an attempt to locate the houses. (Tr. 500-505).

Derden also stated that he had talked to a Houston police officer on the night of the burglary and had asked him for directions to a gas station. The officer, Jack Nabors, testified that he had seen Derden before but could not recall the exact time, place, or date. (Tr. 513-516).

8. Derden was not directly implicated in the burglary for one and one-half years. (Tr. 168-69, 171-72, 404)

crime and an indictment or arrest. *Dickerson v. Louisiana,* 816 F.2d 220, 228 (5th Cir. 1987) *citing United States v. Lovasco,* 431 U.S. 783, 789 (1977) and *Marion,* 404 U.S. at 322. However, in Mississippi, burglary has no statute of limitations. *See,* MISS CODE ANN §99-1-5 (Supp. 1989). Therefore, there was no statute of limitations bar to the charges brought against Derden.

The Speedy Trial Clause of the Sixth Amendment to the United States Constitution also places limitations upon the government's ability to allow charges to grow stale. However, the right to a speedy trial attaches only upon the defendant becoming an accused. *United States v. Hutchins,* 818 F.2d 322, 326 (5th Cir. 1987) *citing Marion, supra,* at 313. A person is not an accused unless he or she is either formally charged or else arrested on criminal charges. *Hutchins,* 818 F.2d at 326 *citing Marion* at 320. In *Marion,* the Supreme Court stated:

> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty of public accusations: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.

404 U.S. 321, 322. Public suspicion is not sufficient to justify the delay in favor of a defendant's speedy trial claim. *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986). The Speedy Trial Clause does not limit the length of a criminal investigation even though "the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." *Loud Hawk*, 474 U.S. at 312 *quoting United States v. MacDonald*, 456 U.S. 1, 9 (1982). When a defendant is not incarcerated or subjected to other substantial restrictions on his liberty, a court should not weigh the time prior to that towards a claim under the Speedy Trial clause. *Loud Hawk*, 474 U.S. at 312. The undersigned concludes that Derden's claim involves a preindictment/prearrest delay; therefore, the speedy trial claim must fail.

The third and final limitation against bringing overly stale claims lies in the Fifth Amendment's Due Process Clause. The Due Process Clause of the Fifth Amendment requires dismissal of an indictment if it were shown at trial that the preindictment delay caused substantial prejudice to a defendant's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the defendant. *Marion, supra* at 324. *See also, United States v. Stumpf*, 827 F.2d 1027, 1030 (5th Cir. 1987) ("To establish that the delay in securing an indictment violated his due process right [A defendant must prove] that he suffered actual prejudice as a result of the delay.") The defendant claiming the violation bears the burden of proving actual prejudice. *Stumpf*, 827 F.2d at 1030 (citations omitted). Mere passage of time does not constitute actual prejudice nor do speculative allegations such as an alleged loss of witnesses or evidence, or unproven charges of deliberate tactical delay. *United States v. Coppola*, 788 F.2d 303, 308 (5th Cir. 1986) *citing United States v. Lovasco*, 431 U.S. 783 (1977). Actual prejudice cannot be proven through generalized claims of memory loss or by a claim that delay necessarily causes prejudice. *Scott*, 795 F.2d at 1249.

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The undersigned concludes that Derden has failed to show actual prejudice and has failed to show deliberate delay by the prosecution. Therefore, he has failed to sustain his burden of proof and his speedy trial claim must fail.

In support of his claim that he was denied a fair trial, Derden next contends that the trial court allowed defense witness Pam Smith to be improperly cross-examined about her failure to come forward with a statement. On cross-examination, the prosecution repeatedly asked Smith questions concerning her failure to give a statement to the police prior to her arrest. (Tr. 527) Derden's counsel objected on the basis of the witness' privilege against self-incrimination but was overruled. *Id.*

The respondents argue that the cases cited in Derden's brief are inapplicable here. The undersigned agrees. *Doyle v. Ohio,* 426 U.S. 610 (1976) and *Austin v. State,* 384 So.2d 600 (Miss. 1980) deal with instances where an accused's post-arrest/post-*Miranda* silence was questioned. Such is not the case here. Witness Smith was questioned by the prosecution about her pre-arrest silence.

The respondents also argue that Derden lacks standing to challenge any alleged infringement of Smith's Fifth Amendment Rights. The undersigned agrees that the Fifth Amendment privilege is personal to the witness and cannot be invoked by a defendant or third party for their own benefit. *United States v. Colyer,* 571 F.2d 941, 945 (5th Cir. 1978).

The undersigned concludes that the questions posed to the witness did no render the trial fundamentally unfair. The questions asked merely properly attempted to impeach the credibility of the witness who claimed she loved Derden. (Tr. 528)

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Derden next argues hat the jury was improperly allowed to hear evidence of other crimes he was allegedly involved in. Derden claims that the following exchange on the redirect examination of state witness Will Sherrod rendered his trial unfair:

> Q. Now, you were charged with a number of armed robberies in Lowndes County and a number of robberies in Alabama, is that correct?
>
> A. That's right.
>
> Q. And Mr. Waide cross-examined you on these, is that right?
>
> A. Right.
>
> BY MR. WAIDE:
>
> Your Honor, if the Court please, I object to this and I'd like to make a record on it outside the presence of the jury. It's improper indirect. It's grossly improper as Mr. Allgood knows and I'd like to make a record on this because I think I know what he's fixing to try to do.
>
> BY THE COURT:
>
> Well I don't and he . . . you asked him about these burglaries. At this time the objection is overruled.

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BY MR. ALLGOOD:

Q. In all of these robberies, who was involved with you?

A. George Derden.

BY MR. WAIDE:

Your Honor I specifically object on the grounds that now he is trying to prove other crimes that Mr. Derden has not been charged with today, and it is all prejudicial.

BY THE COURT:

All right the objection is now sustained and the jury will be admonished to disregard that remark.

(R.295-96)

Derden argues that this question violated the rule in Mississippi that, generally, the prosecution may not introduce evidence of another crime separate from that charged in the indictment and for which the accused in being tried. *See, Bolin v. State*, 4889 So.2d 1091, 1092 (Miss. 1986).

As noted in *Blankenship, supra*, habeas corpus relief is not authorized even if state evidentiary rules appear to have been violated. Also, the objection to the question was sustained and the jury was admonished to disregard the remark. Furthermore, defense counsel had cross-examined Sherrod about his prior

criminal conduct and the state could properly continue that questioning on re-direct examination. In light of the curative instruction, the undersigned concludes that the testimony regarding the separate crimes, standing alone, did not render the entire trial fundamentally unfair.

Derden's final contention regarding the fundamental fairness of his trial is that the alleged errors discussed *supra* had the cumulative effect of rendering his trial fundamentally unfair. The undersigned agrees.

Where the cumulative effect of trail errors is of such magnitude as to offend a sense of justice, is denied and the writ will issue. *Bowens v. Coiner,* 309 F. Supp. 1064, 1071 (S.D.W.V. 1970) *citing Rochin v. California,* 342 U.S. 165, 169 (1951). Though a bright line test for relief under a cumulative effect argument has not been formulated, the Fifth Circuit has acknowledged "the principle of synergistic prejudice and [is] willing to examine sums and multiples when they are presented." *United States v. Cochran,* 697 F.2d 600, 608 (5th Cir. 1983).

The prejudicial atmosphere of Derden's trial begins with the trial judge. As noted above, the trial judge was openly hostile toward Derden and his counsel on several occasions and did not attempt to conceal his hostility. This hostility continued throughout the trial as evidenced by the court's comment toward the end of the defense's case-in-chief:

> MR. WAIDE:
>
> I have one other brief – very brief witness, your honor.

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THE COURT:

All right, if it's not brief, I'm going to make it brief.

(Tr. 537)

Furthermore, during defense counsel's closing argument, the prosecution objected to a certain part of defense counsel's argument. The court responded, "I just wasn't paying attention; I don't know what was said counsel, but you may proceed." (Tr. 582) These comments coupled with the admonitions given to petitioner that were discussed earlier could leave no other impression with the jury than that the trial judge had little regard for the petitioner or his defense. The comments that called into question the petitioner's credibility were particularly critical since the resolution of this case depended on the jury's assessment of credibility of the various witnesses. Based upon the hostile atmosphere created by the trial judge's remarks and attitudes, the undersigned finds that the jury had no choice but to also harbor negative attitudes toward Derden and his defense which probably affected their view of the evidence. While the comments viewed alone would not warrant habeas corpus relief, they must be considered in context of the other elements of the trial that leads to a conclusion that petitioner was not afforded a fair, impartial tribunal.

Next, the undersigned finds that the district attorney's actions in the prosecution of this case were overly zealous. The supreme Court and the several federal appellate courts have long recognized that the prosecutor has a distinctive role in criminal prosecutions. As representative of the government the prosecutor is compelled to seek justice, not convictions. Justice is served only when

convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have evolved with the underlying principle that criminal convictions should be based upon guilt clearly proven in a calm, reflective atmosphere, free of undue passion and prejudice. *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989).

As noted earlier, petitioner was not implicated in this burglary until one and one-half years after the crime and only after deals were cut in the interim with petitioner's co-conspirators, Sherrod, Turner, and Posey.[9] Moreover, as previously discussed, the prosecutor during voir dire attempted to elicit promises from the jury that they would weigh the co-conspirators' testimony equally with any other witness' testimony. While the trial judge correctly instructed the jury on this point at the close of the trial, the prosecutor should have known that this line of voir dire was improper. Such questions clearly infected the jury with the wrong concept of law.

During the redirect examination of the state's first witness, co-conspirator Will Sherrod, the district attorney also successfully, though improperly, informed the jury of other crimes in which Derden allegedly was involved. (Tr. 296) Although the defense's objection was sustained and the jury admonished to disregard the questions, the damage had been done. There can be no doubt that the district attorney knew this question was an evidentiary rule violation, but disregarded the rule in order to get this prejudicial information before the jury. A prosecutor's improper suggestions "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own

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9. Sherrod and Posey were not indicted for burglary and Turner received a five year suspended sentence with five years probation.

view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). After a thorough review of the trial transcript, the undersigned finds that the prosecution's general attitude and demeanor did not produce a trial free of undue passion and prejudice, but evidenced a clear desire to convict petitioner at all costs.

The undersigned concludes that the trial judge's demeanor coupled with the prosecutor's over-zealous actions combined to produce a prejudicial atmosphere that prevailed throughout petitioner's trial. Though Derden may be guilty of the burglary charge, his conviction must be obtained within the rules. All of these actions by the trial court and the prosecutor had the principal effect of improperly questioning petitioner's credibility before the jury in a case that hinged on credibility choices. Such a trial atmosphere clearly infects the jury's judgment and creates a situation in which the determination of guilt or innocence is not based on a reasoned review of the evidence.

II. SUFFICIENCY OF THE EVIDENCE

Derden argues that a directed verdict should have been entered or, in the alternative, the verdict was against the overwhelming weight of the evidence. He claims that "it was totally physically impossible for the burglary to have taken place as described by the state's own witnesses."

Derden states that independent witnesses left no doubt that the burglary occurred at approximately 12:30 a.m. and that burglars Posey and Sherrod, the burglars who were left at the scene when the other burglars fled in the vehicle, arrived back in West Point, Mississippi at 2:00 a.m. or 2:05 a.m. He also states that the testimony of Sheriff McNeel and burglar Turner established that

the drive from the scene of the crime to West Point, along the route Turner claims he, Derden and Pam Smith took, would have taken over three hours. Derden argues that this inconsistency made it physically impossible for the co-conspirators to be telling the truth. Liberally construing this claim, *Haines v. Kerner,* 404 U.S. 519 (1972), the undersigned will treat it as an attack upon the sufficiency of the evidence.

In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court set forth the standard of review to be applied in federal habeas corpus claims which allege that a state court conviction was based on insufficient evidence. In *Jackson,* the petitioner had been convicted of first-degree murder. *Id.* at 309. The Supreme Court recognized in *Jackson* that a sufficiency-of-the-evidence habeas corpus claim "can almost always be judged on the written record without need for an evidentiary hearing in the federal courts." *Id.* at 322.

In *Jackson,* there was no question that the petitioner had shot the deceased, but the crucial issue was whether he had specifically intended to kill her. *Id.* at 324. The court reviewed the record in the light most favorable to the prosecution and applied the relevant state law defining premeditation to test whether a rational factfinder could have reasonably found the petitioner guilty of premeditated murder. *Id.* The court concluded:

> From the circumstantial evidence in the record, it is clear that the trial judge could reasonably have found beyond a reasonable doubt that the petitioner did possess the necessary intent at or before the time of the killing.

Id. at 324-25.

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. . .

> [A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Id. at 326. The court concluded that the appropriate standard for reviewing sufficiency of evidence claims in collateral attacks upon state criminal convictions is that:

> The applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Id. at 324.

This standard was employed by the Fifth Circuit in *Autry v. Estelle*, 706 F.2d 1394, 1407 (5th Cir.), *reh. denied*, 464 U.S. 1 (1983). In *Autry*, the petitioner alleged that there was insufficient evidence presented at trial to support his conviction of murder committed during an attempt to rob. *Id.* at 1407. The Fifth Circuit held that a state court rule requiring independent evidence of "corpus delecti" of attempted robbery had no independent constitutional basis. *Id.* Although the evidence presented at trial showed nothing had been stolen from the murder victims or from the cash register of the store in question, the Fifth Circuit held that a rational trier of fact could have concluded that the murders were committed during the course of an armed robbery, since there was

"no other reasonable hypothesis." *Id.* at 1408. The Supreme Court denied a request for rehearing in *Autry*, and stated that "Federal Courts are not forums in which to relitigate state trials." *Autry v. Estelle*, 464 U.S. 1, 3 (1983). In *Barefoot v. Estelle*, 463 U.S. 880 (1982), the Supreme Court further explained that the primary avenue for challenging the validity of a conviction is the "direct appeal" and when that process is completed, a presumption of finality and legality attaches to the conviction. *Id.* at 887.

After a complete and thorough review of the extensive trial testimony, the undersigned must conclude that petitioner's trial revolved around the credibility of the witnesses' testimony. The undersigned finds that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found petitioner guilty beyond a reasonable doubt.[10] Moreover, it is well-settled that a federal court may not substitute its own judgment regarding the credibility of witnesses for that of the state courts. *Marter v. Blackburn*, 777 F.2d 1007, 1012 (5th Cir. 1985); *Dunn v. Maggio*, 712 F.2d 998, 1001 (5th Cir. 1983). Although as previously discussed, the credibility choices for the jury were tainted by the prejudicial trial atmosphere. Therefore, petitioner's claim based on the sufficiency of the evidence must fail.

III. THE SENTENCE

Derden contends that the seven year sentence imposed upon him is excessive in light of the fact that none of the other co-conspirators received any incarceration for this burglary. He argues that since the trial judge did not conduct a presentence investigation before he sentenced Derden, the only possible

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10. The resolution of this claim is considered without regard to the previous determination of the cumulative errors that resulted in an unfair forum.

ground for the differing treatment was Derden's decision to go to trial rather than plead guilty.

In *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit held that a life sentence under the Texas habitual criminal statute violated the Eighth Amendment because the sentence was grossly disproportionate to the crimes. The defendant had been sentenced to life after having been convicted three separate times for property-related felonies. On appeal to the United States Supreme Court, the Fifth Circuit was reversed and the Court held that the sentence did not violate the cruel and unusual punishment prohibition. *Rummel v. Estelle*, 445 U.S. 263 (1980). The Supreme Court stated that "whatever views may be entertained regarding severity of punishment, whether one believes in its efficacty of its futility, . . . these are peculiarly questions of legislative policy." *Rummel*, 445 U.S. at 283, n.27., *quoting Gore v. United States*, 357 U.S. 386, 393 (1958); *see also, Hutto v. Davis*, 454 U.S. 370, 374 (1982).

Moreover, the Supreme Court has held that a reviewing court should not consider the severity of a sentence that has been set within statutory limits, particularly on habeas corpus review. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). The Fifth Circuit has stated, that "while not reviewing the severity of a sentence, this court will, however, carefully scrutinize the judicial process by which punishment was imposed." *United States v. Cimino*, 659 F.2d 535, 537 (5th Cir. 1982); see also, *United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981); *United States v. Cauazos*, 530 F.2d 4, 5 (5th Cir. 1976); *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1976); *United States v. Fay*, 267 F.2d 507, 510 (2nd Cir. 1959). As long as the trial court stays within statutory bounds and respect procedural safeguards, the sentence may be reversed only

for arbitrary or capricious abuse of discretion. *United States v. Wheeler,* 802 F.2d 778, 783 (5th Cir. 1986); *United States v. Garcia*, 693 F.2d 412, 415 (5th Cir. 1982).

The undersigned finds that the trial court imposed the seven year sentence pursuant to *Miss. Code Ann.* § 97-17-33 (1972). Therefore, finding no abuse of discretion by the trial judge and giving great deference to the Mississippi legislature in setting the punishment for persons convicted to burglary, the undersigned finds no basis on which to interfere in this case.

Furthermore, the fact that Derden received a prison term and the other co-conspirators did not does not present grounds for habeas corpus relief. *See, Buchannon v. Wainwright*, 474 F.2d 1006 (5th Cir. 1973). Also, the failure to procure a presentence report does not provide a basis for habeas relief. *See, Roman v. Parrish*, 328 F. Supp. 882 (E.D. Va. 1971).

IV. THE RADIO LOG

Derden next contends that the state withheld exculpatory evidence after the defense had made a general request (Tr. 7) for the prosecution to produce all exculpatory evidence. He claims that the state failed to produce the Clay County sheriff's radio log for 2/9/83 and 2/10/83. Derden argues that the entries on this radio log proves that state witnesses Hugh Stevenson and Sheriff Sammie McNeel perjured themselves at trial. Both Stevenson and McNeel testified that, according to the radio log, Stevenson called the sheriff's office at 1:00 a.m. in order to run an identification check on Mississippi license plate #MJ30501. (Tr. 384, 387, 409) However, the radio log sheet shows that Stevenson did not make the call until 2:05 a.m. Derden now claims that this alleged perjured testimony and the concealment of alleged exculpatory evidence rendered his trial unfair.

Appendix D

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Therefore, in order to establish a violation of this rule, a defendant must prove: (1) the prosecution suppressed evidence, (2) the suppressed evidence was favorable to the defense, and (3) the suppressed evidence was material to the defense. *United States v. Lanford*, 838 F.2d 1351, 1355 (5th Cir. 1988); *United States v. Lassiter*, 819 F.2d 84, 86 (5th Cir. 1987); *Brogdon v. Blackburn*, 790 F.2d 1164, 1167 (5th Cir. 1986). "Only when omitted evidence is deemed material can a defendant successfully claim that nondisclosure deprived him of his constitutional right to a fair trial." *Porretto v. Stalder*, 834 F.2d 461, 464 (5th Cir. 1987), *citing United States v. Agurs*, 427 U.S. 97, 108 (1976).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court recognized three distinct situations in which the *Brady* doctrine applies and enumerated standards for determining materiality in each circumstance.[11] First, where the prosecution knew or should have known that the conviction was based on false testimony, a new trial is mandated if there is a reasonable likelihood that the false testimony could have affected the jury verdict. *Agurs*, 427 U.S. at 104.[12] Second, if there was no disclosure of information despite a specific defense request, the test is whether the suppressed evidence might have affected the

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11. *See also, United States v. Bagley*, 473 U.S. 667, 678 (1985), *United States v. Mesa*, 660 F.2d 1070, 7076 (5th Cir. 1981); *United States v. Anderson*, 574 F.2d 1347, 1354 (5th Cir. 1978); *Garrison v. Maggio*, 540 F.2d 1271, 1273 (5th Cir. 1976).

12. This category is illustated by *Giglio v. U.S.*, 405 U.S. 150 (1972).

outcome of the trial. *Id.*[13] Finally, in the event of a general request for *Brady* material, or no request at all, a new trial is necessary if the omitted evidence, when viewed in the context of the entire record, created a reasonable doubt that did not otherwise exist. *Id.* at 112-113.[14] However, in *United States v. Bagley*, 473 U.S. 667 (1985) the Supreme Court reformulated two of the three different materiality tests into one all encompassing test. In *Bagley*, the prosecutor failed to disclose evidence that the defense might have used to impeach the government's witnesses by showing bias or interest. Although the court restated the three categories and the three tests for materiality as defined by *Agurs*, the court held that the test for materiality set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), was the proper test to be used in each of the "no request", "general request", and "specific request" situations. *Bagley*, 473 U.S. at 62. The court stated:

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request", and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

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13. *Brady v. Maryland* itself is an illustration of this category.

14. Illustrated by *Agurs*.

Id., see also, Barnes v. Lynaugh, 817 F.2d 339 (5th Cir. 1987); *United States v. McKellar*, 798 F.2d 151, 153 (5th Cir. 1986).

The *Bagley* Court further held that, in light of the totality of the circumstances, a reviewing court may consider any adverse effect that the prosecutor's failure to release information might have had on defendant's preparation and presentation of his case. *Bagley*, 473 U.S. at 682; *see also, United States v. McKellar*, 798 F.2d 151, 153 (5th Cir. 1986). However, if a defendant either knew or should have known of the existence of exculpatory evidence and its value to the defense, the prosecutor is not obliged under *Brady* to furnish the disputed evidence. *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir. 1987). Furthermore, if a defendant could have obtained the exculpatory evidence with reasonable diligence, a *Brady* violation does not arise. *Ramirez*, 810 F.2d at 1343. Notwithstanding that the prosecution has no duty to disclose evidence about which the defendant knew or should have known, there is no requirement of pretrial disclosure of *Brady* material. *Id.*

In the discovery motion submitted by the defense, a general *Brady* request was made. (Tr. 7) Therefore, the test to be applied is the test for the third category as set forth in *Agurs*: a new trial is necessary if the omitted evidence, when viewed in the context of the entire record, created a reasonable doubt that did not otherwise exist. Furthermore, the test for materiality will be that of *Strickland*: evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

The undersigned concludes that the radio log is not exculpatory evidence. The radio log could have been used to impeach the witnesses; however, the utility of the radio log as an impeachment device could not have been recognized until the

witnesses testified at trial. Though the radio log is favorable evidence for Derden's time factor/time frame defense, it cannot be said that the result of the trial would have been different had the radio log been introduced into evidence.

To justify habeas corpus relief on a perjured testimony claim, a petitioner must show that the state knowingly used perjured testimony. *Avery v. Procunier*, 750 F.2d 444, 448 (5th Cir. 1985). The instant claim being liberally construed under *Haines v. Kerner*, 404 U.S. 519 (1972), petitioner has basically presented a *Giglio*[15] claim that the prosecution knowingly allowed false testimony to be presented at trial. To prevail on such a claim, the petitioner must prove (1) that the testimony was actually false; (2) that it was material; and (3) that the prosecution knew it was false. *Griffith v. United States*, 535 F.2d 320, 321 (5th Cir. 1976); *Little v. Butler*, 848 F.2d 73, 76 (5th Cir. 1988); *Avery v. Procunier*, 750 F.2d 444, 447-48 (5th Cir. 1985).

Petitioner has failed to prove that the testimony was false. While the testimony is inconsistent with the entries on the radio log, Derden has made no affirmative showing that the call did not come in at 1:00 a.m. In addition, he has failed to prove that had the witnesses not testified that the call came into the sheriff's office at 1:00 a.m., the verdict would have been different. Derden's *Giglio* claim also must fail.

Derden also claims that this "new evidence" renders the jury's verdict against the overwhelming weight of the evidence. However, the mere existence of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

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15. *Giglio v. United States*, 405 U.S. 150 (1972).

It is well-settled that the federal courts are not forums in which to relitigate state trials. *Autry, supra.*

Finally, in once again applying the *Jackson v. Virginia* test, the undersigned concludes that even in light of this new evidence, the trier of fact could have found Derden guilty beyond a reasonable doubt even though this evidence impeaches the testimony of state witnesses.[16]

V. Assistance of Counsel

Derden's final contention in support of his petition for habeas corpus relief is that he was denied effective assistance of counsel. Derden claims that his retained counsel, Honorable Jim Waide of Tupelo, Mississippi, was generally ineffective and deficient in performing his duties as defense counsel. He also claims that Mr. Waide was ineffective for failing to subpoena Ricky Forrester as a defense witness and for failing to serve the sheriff's radio log. Derden's contentions are without merit.

To merit habeas corpus relief on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test applies to retained counsel as well as appointed counsel.[17] *See, Bonvillain v. Blackburn*, 780 F.2d 1248 (5th Cir. 1986); *Murry v. Maggio*, 736 F.2d 279 (5th Cir. 1984). In *Strickland*, the Supreme Court held that before post-conviction

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16. Although standing alone this ground is insufficient for habeas corpus relief, it is "another brick in the wall" of cumulative errors.

17. *Strickland's* two-prong standard is applied to appellate counsel as well as trial counsel. *McCrae v. Blackburn*, 793 F.2d 684 (5th Cir. 1986).

relief can be granted for ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different. *Strickland*, 466 U.S. at 687, 688; *see also, Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988); *Lavernia v. Lynaugh*, 845 F.2d 493 (5th Cir. 1988); *Bridge v. Lynaugh*, 838 F.2d 770 (5th Cir. 1988); *Thomas v. Lynaugh*, 812 F.2d 225 (5th Cir. 1987); *Martin v. McCotter*, 796 F.2d 813 (5th Cir. 1986). Thus, both a deficiency and resulting prejudice must be shown. *United States v. Lewis*, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the *Strickland* test warrants rejection of his claim. *Bates v. Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the *Strickland* test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687; *see also, Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all of the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and

> evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first *Strickland* criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action might be considered sound trial strategy. *Bridge v. Lynaugh*, 838 F.2d at 773; *quoting Strickland v. Washington*, 466 U.S. at 689. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. *Martin v. McCotter*, 796 F.2d 816, 817 (5th Cir. 1986).

It is not enough to show that some, or even most, defense lawyers would have handled the case differently. *Green v. Lynaugh*, 868 F.2d 176 (5th Cir. 1989). As the Supreme Court has observed, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after a conviction." *Strickland*, 466 U.S. at 689. "It is likewise too facile 'for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.' " *Green, supra* at 178 *citing Strickland*, 466 U.S. at 689.

The prejudice prong of the *Strickland* test requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. It is not enough for the petitioner to show that the errors had some conceivable effect on the outcome of the proceeding, *Sawyer v. Butler*, 848 F.2d 582, 588 (5th Cir. 1988); the petitioner must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sawyer*, 848 F.2d at 588, *Strickland*, 466 U.S. at

694. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *Summitt v. Blackburn*, 795 F.2d 1237, 1242 (5th Cir. 1986); *see also, Lavernia v. Lynaugh, supra*. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Summitt*, 795 F.2d at 1242. A habeas corpus petitioner must affirmatively plead this resulting prejudice. *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988).

Because both the deficiency and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact, the court must make an independent determiniation of whether counsel's representation satisfied the Sixth Amendment. *Martin v. McCotter*, 796 F.2d 813, 817 (5th Cir. 1986), *citing Mattheson v. King*, 751 F.2d 1432, 1438 (5th Cir. 1985), *cert dismissed*, 475 U.S. 1138.

In this case counsel's alleged deficiencies did not prevent any appellate review, nor did appellate counsel entirely fail to subject the prosecution's case to meaningful adversarial testing; therefore, the standard set forth in *Strickland* requiring "an identifiable lapse in the performance of the attorney" must be applied. *Hamilton v. McCotter*, 772 F.2d 171, 181-82 (5th Cir. 1985).

Petitioner argues that Mr. Waide was deficient in his preparation for trial and in his representation at trial. A thorough review of the entire trial record reveals that this claim is simply not true. Mr. Waide tendered more than adequate assistance of counsel. Derden's attack on Mr. Waide's trial strategy and tactics concerning the time factor/time frame defense, including the radio log, is not grounds for habeas corpus relief and reflects the benefit of hindsight. *Strickland v. Washington, supra*.

Appendix D

Petitioner claims that counsel was ineffective because he failed to interview and call a certain witness, Ricky Forrester. Petitioner fails to make a proffer of evidence as to what Forrester's testimony would have been. It is not logical to think that Forrester, not having been indicted, would have testified that he originated the burglary idea and exonerated Derden. The undersigned notes that complaints of uncalled witnesses are not favored in federal habeas corpus review. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984), *citing Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981). Furthermore, petitioner must overcome a strong presumption that counsel's decision to not call the suggested witnesses was a strategic one. *Murray*, 736 F.2d at 282. In evaluating whether counsel's representation fell below an objective standard of reasonableness, a court's scrutiny must be highly deferential with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Marker v. Blackburn*, 777 F.2d 1007, 1010 (5th Cir. 1985). Given all the circumstances of the case at bar, the undersigned concludes that petitioner has failed to overcome the strong presumption that his trial counsel's conduct fell within the range of reasonable professional assistance. Derden's entire ineffective assistance of counsel claim must fail.

VI. Conclusion

For the reasons stated above, the undersigned respectfully recommends that the instant petition for habeas corpus relief be granted and that he be released from custody unless given a new trial wthin 120 days of the date of the final order of this court.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objections to the findings and recommendations herein contained. Objections are required to be in writing and must be filed within ten

days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging such findings and recommendations on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

Respectfully submitted, this 7th day of February, 1990.

s/ Jerry Davis
UNITED STATES MAGISTRATE

NO. 92-1558

In The Supreme Court of the United States

October Term, 1992

GEORGE GUY DERDEN, III

PETITIONER

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

VERSUS

SHERIFF SAMMIE McNEEL AND
MISSISSIPPI DEPARTMENT OF CORRECTIONS

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this cause, arising from the Fifth Circuit Court of Appeals which now stands with the majority of circuits in recognizing cumulative error as a basis for habeas relief, presents the meaningful litigation required for the grant of certiorari?

2. Whether, given the opportunity afforded by cumulative error relief to aggregate, without limit, adverse trial events, the standards imposed by the lower court's opinion provide reasonable confines within which to review such a claim?

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I. This cause, arising from the Fifth Circuit Court of Appeals which is now aligned with the majority of circuits in recognizing cumulative error as a basis for federal habeas relief, does not present the meaningful litigation required for a grant of certiorari. 16

II. Given the opportunity afforded by cumulative error relief to aggregate, without limit, adverse trial events, the standards imposed by the lower court's opinion provide reasonable and needed confines within which to review such a claim. 24

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NO. 92-1558

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEORGE GUY DERDEN, III
Petitioner

versus

SHERIFF SAMMIE McNEEL and
MISSISSIPPI DEPARTMENT OF CORRECTIONS
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTION

Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court denying petitioner's request for habeas corpus relief.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals was rendered on December 16, 1992 in *Derden v. McNeel,* 978 F.2d 1453 (5th Cir. 1992). A copy of the opinion of the Court of Appeals is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court through the statutory authority of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner asserts that this case involves the application of the Fourteenth Amendment of the United States Constitution and the federal statute numbered 28 U.S.C. §2254(a). Both the amendment and

the statute are set out at page 2 of the petition.

STATEMENT OF THE CASE

A. Procedural History.

A detailed description of the procedural chronology of this case is presented herein to reflect the ever-changing nature of this petitioner's purported 'cumulative error' claim.

The case at bar was originally prosecuted in the Circuit Court of Clay County, Mississippi. George Guy Derden was indicted by the Clay County grand jury for the crime of burglary. In April, 1986, he was tried, convicted, and sentenced by the trial court to a term of seven (7) years in the custody of the Mississippi Department of Corrections. ***Derden v. State,*** 522 So.2d 752 (Miss. 1981).

Derden appealed his conviction and sentence to the Mississippi Supreme Court, basing his request for relief on three major assignments of error.

1. Derden was denied a fair trial in violation of the due process clauses of the Mississippi and United State Constitutions.

   a) Evidence of fundamental unfairness was adduced at the pretrial hearing.

   b) The prosecution's obtaining promises by the jurors to believe the State's co-conspirator witnesses, contributed to the denial of a fair trial.

   c) The trial judge's frustrating defense counsel's attempt to make an opening statement contributed to an unfair trial.

   d) The trial judge's commenting that neither he nor the jury "cared" about one of the accused's defenses, contributed to the denial of a fair trial.

   e) The trial judge's continuous correction of the accused, and admonitions to him in front of the jury contributed to the denial of a fair trial.

f) The trial judge's admission of the hearsay statement by Richard Dismuke that Derden had not been at the Apollo Club on the night of the burglary in question contributed to the denial of a fair trial.

g) The two and one-half year delay in the trial contributed to the denial of a fair trial.

h) Permitting the co-indictee, Pam Smith, to be cross-examined about her failure to come forward with a statement concerning the burglary, contributed to the denial of a fair trial.

i) Permitting the jury to hear evidence of other crimes contributed to the denial of a fair trial.

2. A directed verdict should be entered; alternatively, the verdict was against the overwhelming weight of the evidence.

3. The sentence was excessive.

Only one of the claims asserted, 1.b., was deemed worthy of discussion. In affirming the conviction, the Mississippi Supreme Court determined that any error committed by the prosecution during voir

dire was corrected by the granting of a cautionary instruction. *Id.* at 755. The Mississippi court concluded by finding that "[t]he other assignments of error have been studied and are without merit and unworthy of discussion." *Id.* [Emphasis added.]

Derden next sought relief by means of a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi, Eastern Division, filed July 19, 1988. The same three major assignments of error presented to the Mississippi Supreme Court were set forth in the petition as grounds for relief. For "supporting facts", Derden simply attached a copy of the brief filed in the Mississippi Supreme Court on direct appeal.

The ever-changing nature of a cumulative error theory first became

apparent when Derden filed a second petition attacking the same conviction. This petition alleged new and different grounds for relief. By order dated December 20, 1989, the Magistrate Judge determined that the second petition would be considered as an amendment to the original petition. Two grounds for relief were added.

1. Petitioner was denied "a fair trial in a fair tribunal", a matter of basic law.[1]

2. Former jury verdict, when weighed in the "new light" of the time factor/frame, was totally against the weight of the state's evidence.

On February 7, 1990, the Magistrate Judge issued a Report and Recommendation.[2]

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[1]From the Supporting Facts it appears that the claim is that the state withheld exculpatory evidence.

[2]Derden mailed an amended petition for relief on January 31, 1990. The amendment expanded one ground for relief and added a new ground. This amendment was received by the District Court <u>after</u> the Report and Recommendation had issued.

The merits of each of the nine instances of alleged error which Derden argued had denied him a fair trial, were discussed. The Magistrate concluded that none of these alleged errors constituted a constitutional violation and that, standing alone, the alleged errors did not render the entire trial fundamentally unfair. However, the Magistrate recognized cumulative error as a theory for relief and found that "the trial judge's demeanor" in combination with "the prosecutor's over-zealous actions" produced a prejudicial atmosphere that prevailed throughout Derden's trial. The

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An order was entered by which the court declined to permit the amendment "at this late date". The District Court found that the expanded ground had been fully addressed in the Report and Recommendation and that the new ground had never been submitted to the state courts for consideration.

Report and Recommendation rejected Derden's remaining claims.[3]

Both Petitioner and Respondents objected to the Report and Recommendation. Respondents contended: 1) that Derden had not raised a cumulative error claim and the District Court was thus precluded from considering such a claim; 2) based on precedent of the Fifth Circuit, cumulative error was not a proper basis for habeas corpus relief; and, 3) since none of the individual claims rose to the level of a constitutional violation, habeas relief was not warranted.

The Memorandum Opinion in this cause was issued March 19, 1991. That Opinion

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[3]The remaining claims, simplified, are: 1) a directed verdict should have been entered or, alternatively, the verdict was against the overwhelming weight of the evidence; 2) the sentence imposed was excessive; 3) the state withheld evidence; and, 4) assistance of trial counsel was ineffective.

found that Fifth Circuit Court of Appeals precedent controlled the cumulative error question and that that court did not recognize the cumulative error theory as a basis for relief. Finding that none of the alleged violations rose to the level of constitutional error, the District Court held that Derden was not entitled to habeas corpus relief. That Court also held:

> Even if the cumulative error argument were recognized by the Fifth Circuit and the prejudices suffered by petitioner due to errors that, by themselves, do not reach constitutional magnitude could be aggregated, the court disagrees with the magistrate that the case *sub judice* is one where the aggregate of the errors produced a trial that was so fundamentally unfair that petitioner was denied due process of law.

The remainder of the Report and Recommendation which rejected Derden's other

claims was adopted as the opinion of the District Court.

On appeal to the Fifth Circuit Derden argued first that cumulative error was a proper basis for federal habeas corpus relief and, second, that the aggregate of errors in his case was such that relief was warranted under this theory. However, as alleged errors under the cumulative error theory, Derden re-mixed his bag of claims, adding to his cumulative error argument some of the claims which had been considered separate and apart from the cumulative error theory by the District Court.[4]

A panel of the Court of Appeals agreed with Derden's first argument and,

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[4]The claims outlined in Note 3. These claims had been presented and rejected separately both in the Report and Recommendation and in the District Court's opinion.

for the first time, recognized cumulative error analysis in the context of habeas corpus relief. The only standard of review provided by the panel opinion was a test of "whether the trial taken as a whole [was] fundamentally unfair." ***Derden v. McNeel,*** 938 F.2d 605, 609 (5th Cir. 1991). Over strong dissent, the panel also accepted Derden's second argument. ***Derden,*** 938 F.2d at .

Respondents filed a Suggestion for Rehearing En Banc which was denied on September 13, 1991. On further consideration, the Court ordered that the cause be reheard by the Court en banc without oral argument.

On December 16, 1992, the Court of Appeals issued an ***en banc*** opinion which again recognized cumulative error as a theory of habeas relief. However, that

opinion provided standards by which such a claim for relief could be reviewed.

> After ***en banc*** rehearing, we now hold that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process." ***Cupp v. Naughten,*** 414 .S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973).

Derden, 978 F.2d at 1454.

The ***en banc*** court concluded that Derden's case failed to satisfy these standards. The judgment of the district court denying habeas corpus relief was affirmed by the Fifth Circuit. ***Derden,*** 978 F.2d at 1461.

From this ruling, Derden petitions for a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals in this cause.

B. **Statement of Facts.**

On February 10, 1983, someone broke into Wade's Grocery in Pheba, Mississippi, and removed a safe. Two and a half years later, George Guy Derden was indicted for this burglary. At trial, three persons who admitted taking part in the burglary testified for the state. These three testified that they left West Point, Mississippi, along with Derden and his girlfriend, and drove to Pheba where they broke into the grocery. While they were removing the safe, an approaching car interrupted the burglary. The group broke up and the two resulting parties eventually ended up back in West Point.

Derden testified in his own behalf and offered an alibi defense. His testimony was supported by that of his girlfriend and two of his employees. However, the jury did not believe the

alibi defense and found Derden guilty of burglary.

REASONS FOR DENYING THE WRIT

This cause, arising from the Fifth Circuit Court of Appeals which now stands with the majority of circuits in recognizing cumulative error as a basis for federal habeas relief, does not present the meaningful litigation required for the grant of certiorari.

Given the variable and speculative nature of cumulative error as a ground of federal habeas corpus relief, the three conditions proscribed by the *en banc* opinion for the grant of relief on this ground are reasonable.

ARGUMENT

I. This cause, arising from the Fifth Circuit Court of Appeals which is now aligned with the majority of circuits in recognizing cumulative error as a basis for federal habeas relief, does not present the meaningful litigation required for a grant of certiorari.

Derden argues that certiorari should be granted in this cause "because the Fifth, Sixth, Seventh, and Eighth Circuits are in conflict on this important legal principle." Petition at 6. Respondents submit that this cause, arising from the Fifth Circuit Court of Appeals which now stands with the majority of circuits in recognizing cumulative error as a basis for habeas relief, does not present the meaningful litigation required for the grant of certiorari.

Broadly stated, the lower court found that "federal habeas relief may issue if a

defendant was denied fourteenth amendment due process by the cumulative effect of errors committed in a state trial, which together deny fundamental fairness." ***Derden,*** 978 F.2d at 1456. This general finding is subject to the satisfaction of three conditions. ***II., infra.***

When the Fifth Circuit Court of Appeals issued its ***en banc*** opinion in this cause, the lower court joined the two other circuit courts which have specifically adopted the cumulative error theory of relief. Representative decisions of the Sixth Circuit Court of Appeals include: ***Lundy v. Campbell,*** 888 F.2d 467 (6th Cir. 1989), ***cert. denied,*** 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); ***Payne v. Janasz,*** 711 F.2d 1305 (6th Cir. 1983), ***cert denied,*** 464 U.S. 1019, 104 S.Ct. 552, 78 L.Ed.2d 726 (1983); **Walker v. Engle,** 703 F.2d 959 (6th

Cir. 1983), *cert denied,* 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). *Bell v. Duckworth,* 861 F.2d 169 (7th Cir. 1988), *cert. denied,* 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989), issued by the Seventh Circuit Court of Appeals, recognizes cumulative error within the context of the "management of a state criminal trial".[5] *Id.* at 170.

Other circuits have also acknowledged the viability of the cumulative error theory, albeit within the embrace of a specific constitutional claim. For example, both the Ninth and the Eleventh Circuit Courts of Appeals will review

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[5]We note that in so holding, the Seventh Circuit relied upon its decision in *Dudley v. Duckworth,* 854 F.2d 967 (7th Cir. 1988). A single error which "appear[ed] . . . to be of constitutionally significant proportions" was at issue and required reversal. However, the Seventh Circuit also stated that "[v]iewed as a whole, the petitioner's trial was constitutionally unfair." *Id.* at 972.

alleged errors cumulatively to assess prejudice for a ***Strickland v. Washington***[6] claim. ***Ewing v. Williams,*** 596 F.2d 391, 395 (9th Cir. 1979) (prejudice may result from the cumulative impact of multiple deficiencies); ***Walker v. Davis,*** 840 F.2d 834, 838 (11th Cir. 1988) (whether cumulative trial errors can be said to have, in reasonable probability, changed the result at trial).

The Ninth Circuit also will review alleged instances of prosecutorial misconduct within a cumulative error context. *Cain v. Cupp,* 442 F.2d 356, 358 (9th Cir. 1971) ("...failures to disclose may not in themselves be sufficient to justify relief, but they reveal the errors in Petitioner's trial, which, when taken

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[6]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

together, deprived him of the fair trial to which he was entitled.")

However, the Ninth Circuit appears to recognize cumulative error in and of itself as a basis for habeas relief. In ***Lincoln v. Sunn,*** 807 F.2d 805 (9th Cir. 1987), the Court of Appeals remanded a habeas petition on questions of prosecutorial comment and lack of notice by the indictment. However, direction to the district court included the admonition that "the district court should determine whether this error, in conjunction with the other alleged errors, cumulatively deprived Lincoln of his rights." ***Id.*** at 814, n.6.

Thus in its ***en banc*** holding, the Fifth Circuit by proclamation and by fact joined the majority of the circuit courts which have enabled a petitioner to seek federal habeas corpus relief through a

claim of cumulative error.[7] *Derden*, 978 F.2d at 1456. Standing alone against these circuits is the Eighth Circuit Court of Appeals. That Court as recently as three months ago reaffirmed its holding that "cumulative error is not grounds for federal habeas relief as 'each habeas claim must stand or fall on its own'." *McDowell v. Leapley*, 984 F.2d 232, 235 (8th Cir. 1993), (*quoting Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990)).

Where there is a conflict among the federal courts of appeals, this Court will grant certiorari to resolve the conflict. *Chaffin v. Stynchcombe*, 412 U.S. 17, 21,

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[7]Of the remaining circuits, excepting the Eight Circuit, respondents have been able to discover only one additional circuit where cumulative error has been raised. Such a claim was asserted, but not addressed, in *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991), and *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990), before the Tenth Circuit Court of Appeals.

93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); 28 U.S.C. §1254(1). However, this Court has also stated that while it decides questions of public importance, "it decides them within the context of meaningful litigation." ***SS Monrosa v. Carbon Black Export,*** 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 723, ***reh. denied,*** 359 U.S. 999, 79 S.Ct. 1115, 3 L.Ed.2d 986 (1959).

Respondents submit that the litigation at hand is not "meaningful" within the Court's intended sense of the word. The Fifth Circuit's opinion in this cause fuses the position of that court with all but one of the courts of appeals which have directly considered the question. In spite of the guidance provided by the holdings of its sister circuits, it is the Eighth Circuit's holding regarding cumulative error which is singular.

This Court has also stated that "[i]ts function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *SS Monrosa*, 359 U.S. at 184. To grant certiorari in the case at bar would be to 'manage' the minority ruling of the Eighth Circuit through the opinion of the Fifth Circuit which has united with the Sixth, Seventh, and, apparently, Ninth Circuits in considering cumulative error as a viable claim for habeas relief.

The Fifth Circuit having now joined the direction provided by a majority of the courts of appeals who have considered the issue, it is the Eighth Circuit which continues to swim against the tide. Respondents submit that an opinion from that circuit would provide the meaningful litigation necessary to resolve the conflict between that circuit and the

remaining circuits which have adopted cumulative error as a theory of habeas relief.

II. Given the opportunity afforded by cumulative error relief to aggregate, without limit, adverse trial events, the standards imposed by the lower court's opinion provide reasonable and needed confines within which to review such a claim.

Petitioner argues that the three conditions imposed by the Court of Appeals "unduly restrict[] the concept of cumulative error." Petition at 7. Respondents urged the court below to reject cumulative error as an inappropriate theory on which to base a grant of habeas corpus relief. Given that position, which we do not waive, we would submit that the standards proscribed by the *en banc* opinion are reasonable given the nature of the ground of relief at issue.

A petitioner seeking relief by means of the Great Writ must show that he or she is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. 2254(a). Prior to the advent of cumulative error, each individual error asserted was assessed as to whether that error constituted a violation of the Constitution or laws or treaties of the United States. *See e.g., Lee v. Lockhart,* 754 F.2d 277, 279 (8th Cir. 1985) (each claim of a constitutional deprivation asserted in a petition for federal habeas corpus must stand on its own, or, as here, fall on its own[.]).

With the departure of the circuit courts into the realm of cumulative error, however, a habeas petitioner is now free to go fishing in the waters of his record to aggregate sufficient non-Constitutional errors to entitle him to relief. Given

the kaleidoscope of alleged non-Constitutional errors which could be gleaned from a trial of any notable length, we submit the lower court was correct in adopting "a particularly cautious approach to granting habeas relief for cumulative errors". *Derden,* 978 F.2d at 1457. Judge Jones, writing for the *en banc* court stated.

> "Cumulative error" is an infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process. Under its aegis, an error that would not have risen to constitutional dimension by itself might suddenly, when aggregated with other non-constitutional errors, become worthy of habeas relief. The legal certainty afforded by rules drawn from the specific Bill of Rights provisions related to criminal law could then yield to the subjectivity of fundamental fairness determinations. Worse yet, a free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system:

> one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record.

Derden, 978 F.2d at 1457-58.

The case ***sub judice*** proves Judge Jones point. A brief review of the Procedural History, ***infra,*** reveals an ever-changing combination of alleged errors presented under the broad umbrella of cumulative error as this cause wound its way through the review process. ***See also, Derden,*** 978 F.2d at 1461.

The subjectivity of cumulative error without reasonable, objective standards as described by the lower court is also proved by the various conclusions reached by the reviewers of this cause. Three reviewers weighed in with the determination that Derden's trial was not fundamen-

tally unfair: the unanimous Mississippi Supreme Court; the federal district judge; and, the dissent from the panel opinion. However, two reviewers weighed in with the opposite determination: the magistrate judge and the panel majority.

Thus the broad, subjective nature of this basis of relief dictates that reasonable standards of review be imposed. Respondents submit that the conditions upon which relief will be based are reasonable given the above discussed nature of a cumulative error claim.

> (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law;
>
> (2) the errors were not procedurally defaulted for habeas purposes; and
>
> (3) the errors "so infected the entire trial that the resulting conviction violates due process."

Derden, 978 F.2d at 1454 [citation omitted.]

See Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993) (following *Derden*)

Petitioner questions the lower court's concern with the subjective nature of this claim, arguing that fundamental fairness is, by definition, "subjective and free-floating.[8] However, as recognized by the Fifth Circuit, this Court has very narrowly defined the category of infractions that violate 'fundamental fairness. *Derden,* 978 F.2d at 1457, *quoting Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708

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[8]The *en banc* court noted that basing a cumulative error theory of relief on *Rochin v. California,* 342 U.S. 165, 173, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952), is "rather like citing the Declaration of Independence: general statements about inalienable rights or "fundamental fairness" tell us little about the prerogatives of an individual in concrete factual situations.

(1990). The ***Dowling*** court continued by quoting from ***United States v. Lovasco,*** 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

> Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." Rochin v California, 342 US 165, 170 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952). Our task is more circumscribed. We are to determine only whether the action complained of . . . violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," Mooney v Holohan, 294 US 103, 112, 79 L Ed 791, 55 S Ct 340, 98 ALR 406 (1935), and which define "the community's sense of fair play and decency," Rochin v California, supra, at 173 96 L Ed 183, 72 S Ct 204, 25 ALR2d 1396.

Lovasco, 431 at 790.

We submit that the ***en banc*** opinion does <u>not</u> "obliterate" cumulative error as a form of relief. The lower court

conceded that a complete definition of unconstitutional cumulative error was not feasible. However, the court attempted to balance cumulative error as a basis for habeas relief with this Court's established limits on the scope of federal habeas. ***Derden,*** 978 F.2d at 1458. The Fifth Circuit used as illustrations of the various restrictions placed on access to habeas relief this Court's recent decisions in ***Coleman v. Thompson,*** 501 U.S. _ , 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), ***McCleskey v. Zant,*** 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), and ***Teague v. Lane,*** 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). A rudimentary comparison of the standards imposed by these cases concerning the applicability of procedural default rules to the minimum standards imposed in the case at bar reflects no "decimation" of cumulative

error. Instead, these minimum standards provide, as do ***Coleman***, ***McCleskey***, and ***Teague***, an objective gauge by which federal habeas relief can be consistently granted.

A requirement that errors asserted not be procedurally defaulted is well-established in habeas litigation. We would submit that to require the errors submitted to be of constitutional "dimension" differs from petitioner's implicit conclusion that such errors be actual constitutional violations. An alleged trial error may fall outside the boundary of an explicit violation, and thus be insufficient in and of itself to sustain a claim for habeas relief. However, that same error may touch upon or implicate a specific constitutional right and thus be sufficient to sustain cumulative error.

Additionally, we submit that the lower court's reiteration of this Court's own standard regarding review of fundamental fairness claims can not be "unduly restrictive". A complete quotation of this third standard is of aid.

> These cases fit the Supreme Court's description of a denial of due process as "the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that *the absence of that fairness fatally infested the trial;* the acts complained of must be of such quality as *necessarily prevent a fair trial."* ***Lisenba v. California,*** 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (19410 (emphasis added).

Derden, 978 F.2d at 1457 [emphasis added]. To require that a group of alleged errors meet this standard as opposed to a single constitutional violation does not further limit cumulative error relief nor relegate

the whole of the standard to the position of one of three standards.

The standards proscribed by the *en banc* opinion are reasonable given the variable and speculative nature of cumulative error as a ground of federal habeas corpus relief.

CONCLUSION

For the above and foregoing reasons the decision of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of habeas corpus relief was proper. No writ of certiorari should issue nor plenary review granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charlene R. Pierce, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** to the following:

Hon. Leslie Joyner Bobo
Butler, Snow, O'Mara,
Stevens & Cannada
Post Office Box 22567
Jackson, Mississippi 39225-2567

This the 13th day of May, 1993.

Charlene R. Pierce

CHARLENE R. PIERCE